SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

HOMART DEVELOPMENT CO.,

Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUALER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX A.

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION:

Amendment I:

> "Congress shall make no law . . . abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE OF CALIFORNIA PENAL CODE, TITLE XIV, SECTION 602:

> "Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
>
> • • • • •
>
> (1) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

CITY OF SAN BERNARDINO ORDINANCE No. 2491 (September 10, 1968):

> • • • • •
>
> Section 1. . . . Any person, other than a public officer or employee acting within the course and scope of his employment, who enters or remains upon any automobile parking lot, drive-in property or any other place or property open to the public, without the implied or express consent of the owner, his agent or person in lawful possession thereof, or with knowledge that such consent has been withdrawn, is guilty of a misdemeanor. . . .
>
> • • • • •

Section 3. This Ordinance is hereby declared to be for the immediate preservation of the public peace, health and safety and is hereby enacted as an emergency Ordinance to take effect immediately upon its reading in full. A declaration of the facts constituting the urgency is that there is an influx of persons congregating and loitering in malls, parking lots and open areas of drive-ins, shopping centers and business premises who occupy facilities for exceedingly long periods of time. They impede the free flow of passage and prevent the use of business facilities by shoppers. They annoy shoppers and interfere with the work of employees. Upon being requested to move from blocking free passage and upon being requested to relinquish their occupancy of such facilities, they refuse to do so.

That in order to protect the public health, safety and welfare, it is necessary that this Ordinance go into effect immediately to give the owners of such private property and businessmen who own stores and business premises a means to regulate such congregating on and the use by such persons of such private facilities."

APPENDIX B.

OPINION OF THE SUPREME COURT OF CALIFORNIA, DECEMBER 16, 1970.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.
In Bank.

ROGER JON DIAMOND et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, as Sheriff, etc., et al.,
Defendants and Respondents.

L. A. 29803

(Filed Dec. 16, 1970.)

This appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County presents a constitutional question of first impression in this state: May the owners of a privately owned shopping center deny all use of their premises to persons who desire, on those premises, to engage in First Amendment activities unrelated to the business of the center?

Plaintiffs are People's Lobby, Inc., a nonprofit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions, Roger Jon Diamond, attorney for People's Lobby, and William Duxler, a volunteer working for People's Lobby in its initiative campaign. Defendants are Homart Development Company which owns a shopping center in the City of San Bernardino called the Inland Center (Center), the security guard and manager of the Center, the Sheriff and District Attorney

of San Bernardino County, and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a nonresidential area on wedge-shaped property bounded by an interstate highway, a commercial street, and a flood control channel. The Center consists of a large parking lot and a totally covered, air-conditioned shopping complex or mall which contains three major department stores—Sears, The Broadway, and The May Company—and 72 single businesses. All of the stores have an unobstructed frontage on the covered "common aisleway." The mall area is surrounded by a six-to eight-foot wide sidewalk which is adjacent to the parking lot.

The covered mall area is open to the public during business hours by means of entry through unlocked doors. Prospective customers are encouraged to visit the mall, which features piped-in music, benches, attractive 32-foot wide common aisleways, and occasional business promotions and displays. No admission is charged for entry to the mall area and no purchases are required as a condition to entry. On the average, 25,000 persons visit the Center every day, coming from a market area of one million people living in places as far from the Center as 75 miles. The Inland Center is the largest shopping center in San Bernardino County.

Under Homart's regulations, all activity apart from regulated, mutually beneficial business promotions and displays, whether by tenants or strangers, is forbidden on the premises of the Center. The policy is intended to avoid any possible congestion or disturbance which might interfere with amiable shopping by customers, and it is applied without discrimination to all varieties of charitable, religious, fraternal, social, and political groups that seek to use the Center's property for any forms of solicitation or discussion.

On October 28 and 29, 1969, representatives of People's Lobby, Inc. requested permission to gather signatures for an initiative petition and to disseminate information in connection therewith on the Center premises. Specifically, Homart was asked to permit plaintiffs to set up a card table in the mall area or on the uncovered sidewalk for the purpose of gathering signatures and distributing leaflets. Plaintiffs assured Homart that their activities would be orderly and would result in no obstruction of normal Center activities. The requests were denied.

On October 30, 1969, two representatives of the People's Lobby, accompanied by a photographer and a newspaper reporter, entered the Center, set up a card table in the mall area, and proceeded to solicit signatures on the petition, collect donations, and distribute literature. Within a few minutes, the Center's security officer approached and demanded that they cease their activities and leave the Center. They complied by moving their table from the mall area to the exterior sidewalk. Again they were ordered to leave, and they did.

The entire occurrence lasted about half an hour during which time numerous persons signed the petitions. There was no disturbance or disruption of the activities of the Center and no departure from the norm of the mall, other than the existence of the table and the gathering of persons around it to sign the petitions, receive related literature, and contribute to the anti-pollution campaign. The trial court found only that the "use sought involved *potential* obstruction and interference with the use of the property." (Italics added.)

No arrests were made as a result of the incident and the representatives of People's Lobby left the Center after the security officer's second demand that they do so. However, all parties agreed that, if plaintiffs had not complied

with the security officer's demand, police assistance would have been requested. The chief of police testified that he would have removed persons from the Center at the request of Homart if they were in violation of any city ordinance or state statute defining trespass. Penal Code section 602, subdivision (1), defines trespass to include "[e]ntering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof." Therefore, the issues raised by the instant case do not differ substantially from those that would have been involved had plaintiffs been arrested upon refusal to leave the Center.

On November 5, 1969, plaintiffs filed a complaint for injunctive and declaratory relief, alleging that defendants' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutional rights under the First and Fourteenth Amendments. The trial court denied a request for a temporary restraining order and, after a hearing, judgment was entered denying preliminary and permanent injunctions.

At the outset, we face a threshold question of mootness. January 26, 1970, was the original deadline for the securing of signatures on plaintiffs' initiative petitions in time for the 1970 election, and, therefore, it might appear at first blush that the case is now moot. However, in briefs both plaintiffs and defendants urge that the case should not be considered moot because of the likelihood of recurrence of conflict between the parties regarding the rights of plaintiffs and others to engage in free speech activities on the property of the Center. (See *Moore* v. *Ogilvie* (1969), 394 U. S. 814, 816; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind* (1967), 67 Cal. 2d 536, 541.)

In addition, plaintiffs have filed a new petition with the Secretary of State and have announced resumption of a campaign to qualify an initiative measure for the next state election. Therefore, we find that matter is not moot.

Turning to the merits, it is plaintiffs' contention that applicable case precedent interpreting the First Amendment precludes defendants from absolutely prohibiting on shopping center premises speech activities which may not be absolutely barred from the public streets and parks. We conclude that prevailing authority compels our rejection of the proposition that owners of a shopping center may impose blanket and total prohibition on the exercise of First Amendment activities on shopping center property.

We start from the premise that peaceful and orderly solicitation of signatures, discussion of issues, and distribution of information are First Amendment protected activities which may not be prohibited broadly and absolutely on public streets, parks, and similar public places traditionally associated with the exercise of First Amendment rights. (See *Food Employees* v. *Logan Plaza* (1968), 391 U. S. 308, 313, 315; *Hague* v. *C. I. O.* (1939), 307 U. S. 496.) We must decide whether the Inland Center, because of its private ownership, may insulate itself from such protected activities.

In *Marsh* v. *Alabama* (1946), 326 U. S. 501, the United States Supreme Court determined that the owners of a company town could not prevent the exercise of First Amendment rights on privately owned streets in the business district; therefore, it was held that a member of Jehovah's Witnesses could not be absolutely prohibited from distributing religious literature on the streets of the town. The court recognized that under some circumstances property that is privately owned may be treated as though it were publicly held, at least for First Amendment pur-

poses: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . .

"Many people in the United States live in company-owned towns. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (Fns. omitted.) (*Id.* at pp. 506, 507, 508-509.)

Defendants concede that *Marsh* protected all First Amendment activities on the privately owned streets of the company town, regardless of any special relationship to the business of the town, but they contend that *Marsh* is distinguishable from the instant case which involves a privately owned shopping center and not an entire company town. They assert that in a company town there are no alternative effective channels of communication, while the customers and employees of a shopping center leave it each day and return to communities where they may be exposed to First Amendment communications on public streets, sidewalks, and parks.

It cannot be denied that there are distinctions between a company-owned town and a shopping center with regard to the availability of public property in the surrounding community, but the diferences have been diluted by subsequent United States Supreme Court decisions. In *Food Employees* v. *Logan Plaza* (1968) *supra*, 391 U. S. 308, the court applied the principles of *Marsh* to invalidate a shopping center's blanket prohibition of picketing on its premises. Limiting its holding to the facts before it—union picketing of an employer whose business was located within the shopping center—the court drew broad parallels between the company town in *Marsh* and the shopping center in *Logan*: "The similarities between the business block in *Marsh* and the shopping center in the present case are striking. . . . The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.

"It is true that, unlike the corporation in *Marsh*, the respondents here do not own the surrounding residential property and do not provide municipal services therefor. . . . Thus, unlike the situation in *Marsh*, there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. . . .

"We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business

district should be limited simply because the property surrounding the 'business district' is not under the same ownership." (*Id.* at pp. 317-319.)

The foregoing language clearly indicates that for First Amendment purposes the Supreme Court could see few relevant differences between the company town in *Marsh* and the shopping center in *Logan*.[1] Although the court understandably limited its holding to the facts before it, *Logan* is persuasive authority for the proposition that the right to engage in peaceful and orderly First Amendment activities on the premises of shopping centers should be protected to the same extent as the right recognized by the court in *Marsh* for residents of company towns. The implication is clear from *Logan* that modern-day shopping centers, serving as the business districts for the surrounding residential communities, have important public functions, and their owners may not rely on their private ownership to justify blanket prohibitions on First Amendment activities that could lawfully be conducted on public property. Indeed, in many instances the contemporary shopping center serves as the analogue of the traditional town square.

More recently, in *In re Cox* (1970) 3 Cal. 3d 205, we have had occasion to consider the constitutional implications of the role of the present-day shopping center. We held that a shopping center, like a city, could not engage in arbitrary discrimination on the basis of race, politics or dress in violation of the equal protection clause of the Fourteenth Amendment. We explicitly recognized that "[t]he shopping center has undertaken the public function of providing

1. It is noteworthy that the shopping center in *Logan* was substantialy smaller than the Inland Center. At the time of the litigation in *Logan*, only Sears and Weis Markets, Inc. were located in that shopping center; 15 additional businesses had joined the center at the time of the Supreme Court's decision.

society with the necessities of life and has become the modern suburban counterpart of the town center." (*Id.* at p. 216, fn. 11.) "In undertaking to provide the necessities and amenities of life, the shopping center performs an important public function. . . . Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (*Id.* at p. 218.)

Finally, in *Tanner* v. *Lloyd Corporation* (D. Ore. 1970), 308 F. Supp. 128, the federal court considered facts almost identical to those before us and, relying on *Marsh* and *Logan,* held that a shopping center could not constitutionally prohibit private persons from distributing handbills within the center mall. "The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town. I do not believe that distinction should cause a different result. . . . In my view, an owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature. . . . If this were not true, the public need for uncensored information, on which *Marsh* was based, could be frustrated." (*Id.* at p. 132.)[2]

Thus, the rationale of *Marsh,* plus the analogy drawn between the company town and the shopping center by *Logan* and related cases, compel a decision to grant injunctive and declaratory relief. But we need not rely solely on the foregoing approach; additional instructive precedent

2. Defendants also attempt to distinguish *Marsh* by insisting these plaintiffs can assert their First Amendment rights by means of mass media. It seems evident that mass media are particularly inappropriate for plaintiffs' purposes: no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio or television.

supports plaintiffs' request for protection of their First Amendment rights.

In *Logan,* the Supreme Court held that a shopping center could not absolutely prohibit union picketing of a business located within the Center. The court expressly declined to decide whether "respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." (391 U. S. at p. 320, fn. 9.) In *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, we reached an identical result four years prior to the Supreme Court decision in *Logan.* Striking a balance between the interests of union members in picketing an employer and the desire of the owners of the center to prohibit peaceful picketing, we held that the owner of a shopping center could not enjoin as a trespass the peaceful picketing by union members of premises in the center leased by the owner to the employer of the union members. Most recently, in *In re Lane* (1969), 71 Cal. 2d 872, we extended the principles of *Logan* and *Schwartz-Torrance* to the privately owned sidewalk in front of a large supermarket and held that unobstructive union picketing and handbilling on the sidewalk were protected under the First Amendment as against the property rights of the owner-employer.

This series of cases involving union picketing in shopping centers establishes constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted. A logical query then arises as to whether these cases provide an additional source of authority in support of plaintiffs' right to solicit signatures and distribute information within the Inland Center. Defendants contend that *Logan, Schwartz-Torrance,* and *Lane*

are clearly distinguishable from the instant action because the First Amendment activity conducted by plaintiffs here was not directly related to the purposes for which the Inland Center properties were being used.

Indisputably, defendants have isolated a relevant difference between the precedents and the instant case, but the question remains whether the difference justifies the holding of the trial court that defendants are free to prohibit all nonbusiness-related First Amendment activities on their premises. Both *Schwartz-Torrance* and *Logan* did rely in part on the fact that the unions involved were picketing businesses located within the shopping centers, but that circumstance was relevant only because it strengthened the interest of the petitioners in their exercise of the First Amendment activities inside the shopping centers. When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.

Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so on the public streets and sidewalks in the surrounding community. Nevertheless, it is clear that they have a substantial interest in being able to solicit signatures and distribute information at the Center. Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures. The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable

location for the conduct of plaintiffs' First Amendment activities.

To be balanced against the interest of plaintiffs in the exercise of their First Amendment rights at the Center is the interest of defendants in the complete prohibition of nonbusiness-related activities. Language in *Schwartz-Torrance, Logan,* and *Lane* defines the scope of the property interest possessed by the owners of shopping centers and is no less applicable to defendants in the case at bar. In *Schwartz-Torrance,* we stated: "[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his [*sic*] property to the public. . . . [It] suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public. . . . The Supreme Court of the United States in *Marsh* . . . describes the diluted nature of a property right in premises opened to the public." (61 Cal. 2d at p. 771.) We concluded, "the interest of the [owner] lies in the shadow cast by a property right worn thin by public usage." (*Id.* at pp. 774-775.)

The Supreme Court in *Logan* used similar language to describe the property interest of the owners which was to be balanced against the union's interest in the exercise at the center of its First Amendment rights: "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights . . . is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents

here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (391 U. S. at p. 324.) In *Lane,* we quoted from *Logan* and balanced the "naked title" of the owners of the supermarket against the "paramount and preferred place given to the First Amendment freedom of speech right in our democratic system. . . ." (71 Cal. 2d at p. 878.)

Therefore, although there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan,* and *Lane,* their contention does not justify striking the balance in favor of defendants' property rights. As we have explained, plaintiffs' interest is of significant constitutional dimension, while defendants' concern is no stronger than the interests of the property owners in *Schwartz-Torrance, Logan,* and *Lane.* There is no allegation that the plaintiffs' conduct was in any way disruptive of the business activities carried on at the Center; and the trial court's finding of a "potential obstruction and interference with the use of the property" does not justify a blanket bar on all First Amendment activities, but merely suggests reasonable regulation of those activities.

The foregoing analysis indicates that we may not ignore the impact of *Schwartz-Torrance, Logan,* and *Lane* solely because those cases involved First Amendment activities related to the purposes for which the affected properties were being used. Furthermore, there is persuasive California authority which rejects the tests relied on by defendants to distinguish *Schwartz-Torrance, Logan,* and *Lane* from the case at bar. *In re Hoffman* (1967), 67 Cal. 2d 845 involved the constitutionality of a municipal ordinance which limited permissible activities in railway stations to

those related to railroad business. We held that the ordinance could not be applied, consistently with the First Amendment, to prohibit defendants from peacefully distributing antiwar leaflets at Union Station in Los Angeles, a privately owned railway station. In reaching this result, we expressly rejected the city's contention that the station could be limited to railroad-related uses so long as defendants were able to disseminate their views at alternative locations. "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities. . . .

"Similarly in the present case, the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use. . . . Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. . . .

"Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave. . . . It is immaterial that another forum, equally effective, may have been available to petitioners. . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum." (*Id.* at pp. 850, 851, 852 and fn. 7.)

Hence, in *Hoffman* we held that the bare title of the owners of the railroad station was not a sufficient interest

to outweigh the interest of petitioners in the exercise of First Amendment rights at the station. We reached that conclusion even though the particular speech activities involved were not directly related to the normal uses of the affected business property. (See also *Wolin* v. *Port of New York Authority* (2d Cir. 1968), 392 F. 2d 83; cf. *Burnside* v. *Byars* (5th Cir. 1966), 363 F. 2d 744.)

Defendants would have us distinguish *Hoffman* on the ground that the potential for obstruction and interference occasioned by the exercise of unrelated First Amendment rights in a shopping center is much greater than that potential in a railway station. They contend that the normal functioning of business in a shopping center demands a more rigid standard of order and tranquility than the business activities at railway stations, up to recent years characterized by noise and commotion. Therefore, they conclude that their interests in prohibiting activities unrelated to business in the Inland Center are greater than the concerns of the owners of Union Station.

Though debatable, it may be conceded that a large shopping center is not likely to be as noisy, crowded, or active as the railway station in *Hoffman*, but the difference is one only of degree. Certainly, a shopping center does not require the same perfect order, silence, and contemplative environment as, for example, a public library or courthouse. A shopping center to which the public is invited and where thousands of persons come to shop, browse, stroll, and talk is no more likely to be disrupted by peaceful and orderly circulation of a petition than a railway station; and the business of a railway station, as much as that of a shopping center, can be disrupted by *unregulated* First Amendment activity, whether that activity is related or unrelated to the uses of the affected property. Thus the owner of a shopping center, like the owner of a railway station, has no

legitimate interest in absolutely prohibiting all First Amendment activities on his premises.

It bears repeating that no evidence was presented to the trial court that plaintiffs' activities actually interfered with the normal business operations of the Inland Center.[3] Plaintiffs do not contend that they are entitled to use private property for the dissemination of ideas without limitations imposed by reasonable regulations designed to protect the business activities of the Center. Each of the cases upon which we rely—*Marsh, Logan, Schwartz-Torrance, Lane,* and *Hoffman*—presumed that the property owners involved were free to impose "reasonable regulations" upon the exercise of First Amendment rights on their premises; and each of the cases emphasized that disruptive First Amendment activities may be prohibited by the owners of private property opened to the public.

We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights be exercised, if at all, through reasonable regulations calculated to protect their business interests rather than through absolute bans on all non-business-related activities. Shopping centers, like railway stations, are not incapable of regulating permissible activities. If regulations could not be designed, the decisions in *Schwartz-Torrance* and *Logan* might have produced chaos, as labor unions and other groups would have been free to picket businesses in the shopping centers without reasonable limitation as to time, place, or manner. Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales pro-

3. The "obstruction" in this case is comparable to that involved in *In Re Wallace* (1970), 3 Cal. 3d 289, 295.

motions and displays that are permitted in the common aisleways: "In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors." Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers.

We conclude that the line of cases beginning with *Marsh* and including *Schwartz-Torrance*, *Logan*, *Lane*, and *Hoffman* compels a reversal of the judgment rendered by the trial court and entitles plaintiffs to a judgment confirming their right to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center[4] and declaring that defendants may not constitutionally impose a prohibition on all First Amendment activity on the premises of their shopping center. Unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public.

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4. Although the parties have not raised the issue, we have not overlooked consideration of the concept of state action. It is elementary constitutional doctrine that the First and Fourteenth Amendments protect individuals only from state action which inhibits their free speech rights. Here we find state action of a character comparable to that in *Logan*, *Schwartz-Torrance*, and *Lane*. We explained in *In re Cox* (1970), supra, 3 Cal. 2d 205, 217 fn. 11: "In *Logan Valley*, *Lane and Schwartz-Torrance*, the United States Supreme Court and this court found 'state action' under the Fourteenth Amendment in a shopping center's refusal to permit the exercise of First Amendment rights in such public areas as sidewalks, parks, and malls."

The judgment is reversed and the trial court is directed to enter judgment for plaintiffs consistent with the views expressed in this opinion.

MOSK, *J.*

We concur:

WRIGHT, *C. J.*
PETERS, *J.*
TOBRINER, *J.*
BURKE, *J.*
SULLIVAN, *J.*

Diamond v. *Bland*
L. A. 29803

DISSENTING OPINION BY MCCOMB, *J.*

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Gardner in the opinion prepared by him for the Court of Appeal in *Diamond* v. *Bland* (Cal. App.), 87 Cal. Rptr. 97.

MCCOMB, *J.*

APPENDIX C.

OPINION OF THE CALIFORNIA COURT OF APPEALS, MAY 25, 1970.

COURT OF APPEAL, FOURTH DISTRICT.

Second Division

State of California

ROGER JON DIAMOND, et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, et al.,
Defendants and Respondents.

4 Civil 10084

OPINION.

(Filed May 25, 1970.)

APPEAL from a judgment of the Superior Court in and for the County of San Bernardino. James E. Cunningham, Sr., Judge. Affirmed.

Roger Jon Diamond for Plaintiffs and Appellants.

Lonergan, Jordan & Gresham, and Allen B. Gresham, for Defendants and Respondents Homart Development Company, James Lambert and C. H. Barrett.

Stanford D. Herlick, County Counsel, and Paul A. Grube, Jr., Deputy County Counsel, for Defendants and Respondents Frank Bland and Lowell E. Lathrop, Sheriff and District Attorney, respectively, of San Bernardino County.

Ralph Prince, City Attorney, for Defendants and Respondents Mayor Al C. Ballard and Chief of Police Louis J. Fortuna of the City of San Bernardino.

Lawrence M. Cohen, by comity, for Defendants and Respondents.

This is an appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County.

All parties agree that this is a case of first impression. It presents the following constitutional question: May the owners of a privately owned shopping center deny the use of their premises to those who desire to use those premises for First Amendment purposes and activities unrelated to the business of the center?

We hold that they may.

Plaintiffs are People's Lobby, Inc., a non-profit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions; Roger Jon Diamond, attorney for People's Lobby, Inc; and William Duxler, a volunteer petition carrier for People's Lobby, Inc.

Defendants are Homart Development Company which owns and operates a shopping center in the City of San Bernardino known as the Inland Center; C. H. Barrett, its security guard; James Lambert, its manager; the Sheriff and District Attorney of San Bernardino County and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a non-residential area and is bounded by a drainage channel, a six-lane interstate highway and a commercial street. In industry parlance, it is a "regional fashion center" which connotes a shopping center with only "top line stores" which services a large

geographical area. It contains a large parking lot, a totally covered, air-conditioned shopping complex which consists of three major stores—Sears, The Broadway and The May Company—and sevently-two "tenant stores" all of which have an unobstructed front on the covered "mall" or "common aisleway." The complex is surrounded by a six to eight foot wide sidewalk. Adjacent to the sidewalk are heavily traveled driveways and the parking lot.

The covered mall area is open during business hours to customers or those other doing business with the Center by means of entry through unlocked doors. Homart encourages customers to visit the mall in anticipation of increased sales for the tenant shops. It furnishes piped-in music, receptacles and benches on the thirty-two foot wide common aisleways. It forbids the tenant stores from engaging in sales or other activities on the mall aisleways and spends, along with the tenant stores, considerable sums of money to make the mall an attractive and convenient place for customers. Customers are also encouraged to come to the Center by means of promotions and generally unmanned displays conducted in the mall area pursuant to contractual arrangements and closely regulated by Homart as to time, date, location and format.

Under Homart's regulations *all* activity apart from such regulated, mutually beneficial promotions and displays, whether by tenants or strangers, is forbidden on the common aisleways of the mall area. This policy is an integral part of Homart's objective to create a pleasant and attractive area for customers to shop without congestion or interference. This policy is well established and enforced without discrimination. Pursuant to this policy, although the center receives many calls from all varieties of religious, charitable, fraternal and political groups who seek permission to use the Center property, all such forms of solici-

tation, distribution of material and like activity are and have been prohibited on the Center property.

Twenty-five thousand persons per day on the average shop and visit Inland Center. Persons visiting the Center customarily arrive by motor vehicle, drive into the parking lot which has passage ways governed by motor vehicle traffic regulations. At each entrance to the parking lot are "no trespass" signs indicating that it is private property and admission is subject to revocation.

On October 28 and 29, 1969, representatives of Inland Center were asked by representatives of People's Lobby, Inc. for permission to gather signatures for their initiative petition and disseminate information in connection therewith. Although a request for use of the mall area was made, Homart was also asked if the uncovered six to eight foot sidewalk between the structural and the parking lot areas could be used. Both requests were denied. Appellants advised Homart that their activities would be orderly and that they would not obstruct anything although they would like to use a card table to gather signatures, but Homart still rejected their request.

On October 30, 1969, at approximately 7:45 p.m., Duxler and another individual representing People's Lobby, together with a newspaper reporter and a photographer whom Duxler had requested to be present, entered the Center, went into the mall area and set up a standard size card table. There they proceeded to solicit signatures on the initiative petition, disseminate information with regard thereto, pass out bumper stickers, collect donations in a contribution container and affix a sign describing their purpose to the Center directory.

Shortly thereafter, Mr. Barrett, the security officer, observed a crowd of people congregating in the mall and proceeded to investigate the reason therefor. After as-

certaining that Duxler and the other individuals were acting without permission, he requested that they cease their activity and leave the Center. They took down their card table, discontinued their activities and left the mall area, only to resume their activities on the exterior sidewalk. Again, Barrett requested they leave and this time they did.

The entire transaction lasted about half an hour during which time numerous persons signed the petitions. Other than the existence of the table and the activities of Duxler and the other individuals in securing the signatures on the initiative petitions, there was no "disturbance" or "disruption" in the usual sense of the use of those words. Everyone behaved admirably.

While no threat of prosecution was made nor was anyone arrested, the testimony is clear that if plaintiffs had not complied with Barrett's request, he would have reported the matter to Lambert, the Center manager, who, in turn, would have requested police assistance. The Chief of Police, in turn, testified that had his office been called upon, he would have removed persons from the Center at the request of Homart if they were in violation of the City Trespass Ordinance or a State Penal Code section defining trespass.

There were alternative means and locations whereby plaintiffs could have accomplished their desired objectives without utilizing the private property of the Center. The solicitation could have been undertaken on public sidewalks, in public parks, at public buildings, and at entertainment and sporting events. Other communication with the public admittedly could have been had through newspaper media, radio, television, telephone, door-to-door contact, bumper stickers and mailings. However, appellants contend, and we feel that the record substantiates the con-

tention, that these methods are not as desirable or as effective as the use of a shopping center or mall where the public congregates in large numbers on foot.

On November 5, 1969, appellants filed a complaint for injunctive relief (which contained a prayer for declaratory relief) alleging that respondents' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutonal rights. A request for a temporary restraining order was denied, and, after a hearing on November 14, 1969, the request for a preliminary injunction was also denied. The parties then stipulated that the order of the trial court denying the preliminary injunction should also apply to the request for a permanent injunction and a judgment was entered accordingly on December 5, 1969. Notice of appeal was filed by appellants in this court on December 8, 1969.

A threshold question of mootness presents itself.

The parties urge and we agree that the case is not moot.

January 26, 1970, was the deadline for the securing of signatures for plaintiffs' initiative petition. The findings and judgment of the trial court were entered on December 5, 1969. Thus, when the case was before that court, the issues were clearly not moot. However, the time has now passed for the securing of additional signatures and at first blush it would appear that the case is now moot.

Generally, an action which originally was based upon a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. The appeal should be dismissed. The reason for this rule is that a reversal in such a case would be without practical effect. (*Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal. 2d 536; *Consolidated*

Vultee Aircraft Corp. v. *United Auto etc. Workers,* 27 Cal. 2d 859; *Nomm* v. *Nomm,* 164 Cal. App. 2d 663.)

However, the parties have filed with this court a joint declaration in which they both submit that the case should not be considered moot. In support of this contention, plaintiffs allege that they are presently seriously contemplating other similar campaigns and regard access to Homart's property and that of other similarly situated shopping centers to be essential thereto. In turn, Homart alleges that the Inland Center has frequently been approached by various people seeking to engage in solicitation and related activities, and contends that it can reasonably be anticipated that not only the plaintiffs but numerous other groups will seek to engage in similar activities in the future. Thus, the parties urge that a recurrence of plaintiffs' October 30, 1969 conduct may reasonably be anticipated in the future. Plaintiffs reasonably believe that if they do so, Homart will impose on them what they consider to be an unconstitutional impediment on their exercise of First Amendment free speech rights. On the other hand, Homart reasonably believes that if the plaintiffs press forward with their planned program, it would be placed in the dilemma of either ejecting them as it did in the instant case and thus become subject to similar litigation or doing nothing and thus being deprived of what it believes to be its Fifth Amendment property rights.

Under certain conditions Appellate Courts may entertain a case which subsequent events appear to have made moot. Some of the criteria for this exception to the rule of mootness are:

(1) There is a reasonable likelihood of the same problem recurring between the same two parties giving rise to future litigation on the same subject.

(2) There remain material questions for the court's determination.

(3) Underlying questions persist.

(4) The relief prayed for may encompass future and contingent legal rights.

(5) The parties agree that a finding of mootness would necessitate future litigation, i.e., that a finding of mootness would relegate the parties to the very situation which precipitated the present litigation, a development creating a continuing controversy calling for decision.

(6) That it is likely that the continuing controversy would never be decided on appeal because of the limited time involved in the questioned activity.

(7) That the controversy involves a question of great public interest.

(*Moore* v. *Ogilvie,* 394 U. S. 814 [23 L. Ed. 2d 1, 89 S. Ct. 1493]; *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 178-179 [21 L. Ed. 2d 325, 89 S. Ct. 347]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind, supra,* 67 Cal. 2d 536; *County of Madera* v. *Gendron,* 59 Cal. 2d 798; *Di Giorgio Fruit Co.* v. *Department of Employment,* 56 Cal. 2d 54; *Rattray* v. *Scudder,* 28 Cal. 2d 214; *Jordan* v. *County of Los Angeles,* 267 Cal. App. 2d 794; *Kirstowsky* v. *Superior Court,* 143 Cal. App. 2d 745.)

While all of the above criteria need not exist for a finding against mootness, it is obvious that in this case each of the standards listed do apply. Therefore, we hold that this case is not moot.

Turning to the merits of the case, appellants contend that under applicable case law, they can conduct on respondents' mall and on its sidewalks, driveways and parking lot whatever First Amendment protected activities they could on the public streets of a city—in this case solicit signatures for their petition, disseminate information and collect donations.

Respondents reply that appellants can have the unconsented use of respondents' property only if the manner and purposes sought are consistent with the use to which the property is actually put and then only when there are no alternative effective means of communication readily available.

For an answer to these contentions, it is necessary to trace in some detail the legal history of the use of privately owned shopping centers for First Amendment purposes.

One is first met with the somewhat vague but widely used expression that public streets, highways and parks have been "traditionally" or "from time immemorial" the place for the exercise of First Amendment rights of free speech. However, as Chief Justice Traynor pointed out in *In re Hoffman,* 67 Cal. 2d 845 at 849, the "time immemorial" from which streets and parks had been required to be held open for First Amendment activities really dates from 1939, with the case of *Hague* v. *CIO,* 307 U. S. 496 [83 L. Ed. 1423, 59 S. Ct. 954]. In that case the Supreme Court determined that First Amendment activities on public streets, sidewalks, and parks could be regulated only to the extent necessary to prevent interference with the municipality's interest in protecting the public health, safety or order or in assuring the efficient and orderly use of streets and parks for their primary purpose. The difficulty of fashioning a workable set of rules for even this concept of the exercise of First Amendment rights on public property has produced a number of decisions which have divided the court. (See *Adderley* v. *Florida,* 385 U. S. 39 [17 L. Ed. 2d 149, 87 S. Ct. 242]; *Brown* v. *Louisiana,* 383 U. S. 131 [15 L. Ed. 2d 637, 86 S. Ct. 719]; *Cox* v. *Louisiana,* 379 U. S. 536 [13 L. Ed. 2d 471, 85 S. Ct. 453]; *Edwards* v. *South Carolina,* 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]; *Jamison* v. *Texas,* 318 U. S. 413

[87 L. Ed. 869, 63 S. Ct. 669]; *Schneider* v. *New Jersey,* 308 U. S. 147 [84 L. Ed. 155, 60 S. Ct. 146].)

Then in 1946 the United States Supreme Court extended this principle to a company-owned town in *Marsh* v. *Alabama,* 326 U. S. 501 [90 L. Ed. 265, 66 S. Ct. 276]. In *Marsh,* all the property interests in the town were held by a single company. However, the town did not function differently from any other town. It consisted of residential buildings, streets, sidewalks, a system of sewers, a sewage disposal plant and a business block in which business places were situated. All were owned by the company. A deputy sheriff, paid by the company, acted as the town's policeman. Merchants and service establishments rented the stores and business places in the business block and the United States Government maintained therein a post office from which mail was delivered to the people of the town. "In short the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belonged to a private corporation." (*Marsh* v. *Alabama, supra,* 326 U. S. 501, 503 [90 L. Ed. 265, 66 S. Ct. 276, 277].)

Appellant, a Jehovah's Witness, was distributing religious literature on a sidewalk in the business block. She was told to leave, refused, was charged with and convicted of trespass. The Supreme Court reversed the conviction holding that in such a company-owned town appellant's First Amendment rights were the same as though she had been pursuing those rights on a publicly owned sidewalk. The reasoning in *Marsh* is clear. Since *all* of the property was owned by the company, *any* use of the company-owned streets and sidewalks was the equivalent of engaging in such activity on publicly owned streets and sidewalks in an ordinary town. In other words, it was held to

be proper to carry out *any* First Amendment protected activities on the privately owned streets of a company-owned town that could be carried out on the publicly owned streets of an ordinary town. While the language of the case does not use the exact expression "the lack of alternative effective means of communication," the facts of the case and the holding make it clear that this concept loomed large in the opinion. In a company-owned town there are no alternative effective means of man-to-man communication—by word of mouth, handbills, placards, etc. Were the company-owned town to deny *all* First Amendment rights on its streets and public places, the inhabitants would have nothing but radio, television (not very potent in 1946), mail and newspapers (assuming the landowner allowed newspaper sales and delivery) by which communication on matters of public interest could be brought to the attention of the inhabitants.

Then in 1964 the Supreme Court of this State decided the landmark case of *Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union,* 61 Cal. 2d 766. In this case, the court held that the owners of a shopping center could not enjoin as a trespass a union's peaceful *picketing* of premises leased by an employer from the owners of the shopping center. The court concluded that the union's interest in picketing outweighed the property owner's interest in "vindicating a theoretical invasion of its right to exclusive control and possession of private property." (*Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union, supra,* 61 Cal. 2d 766, 772.)

While *Schwartz-Torrance* cited *Marsh* for the general principle of "the diluted nature of a property right in premises open to the public" (*Schwartz-Torrance, supra,* p. 771), the case was decided primarily upon labor relations law and on a public policy favoring concerted activities of

employees for the purpose of collective bargaining. (Labor Code, § 923; *Messner* v. *Journeymen Barbers etc. International Union*, 53 Cal. 2d 873; *Shafer* v. *Registered Pharmacists' Union*, 16 Cal. 2d 379.) The preferential status of picketing under our laws weighed heavily with the court in *Schwartz-Torrance*. In other words, *Schwartz-Torrance* was and is a *picketing* case and the language of that case should not be extended beyond the factual situation presented therein.

The case in which appellants place their primary trust is *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 [20 L. Ed. 2d 603, 88 S. Ct. 1601], decided in 1968. Here the principles of *Marsh* were extended from a company-owned town to an ordinary shopping center *in a picketing case*. The court held that for the purposes of that case an ordinary shopping center was the functional equivalent of a community business block and for First Amendment purposes *as reflected by picketing and handbilling in a labor dispute involving places in the shopping center*, it was to be treated in the same manner.

However, *Logan Valley* specifically failed to resolve the question of whether it was necessary that First Amendment protected activities to be carried out on a shopping center have a causal connection or be directly related to the purpose to which the shopping center property was being put. The court stated (391 U. S. at p. 319, 88 S. Ct. 1609), "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *State of Alabama*, 326 U. S. at 508, 66 S. Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises *in a manner and for a purpose*

generally consonant with the use to which the property is actually put." [Emphasis added.] The court follows that statement with footnote 9 on the same page, which reads: "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was *not thus directly related in its purpose to the use to which the shopping center property was being put.*" [Emphasis added.]

In 1969, the Supreme Court of this State in *In re Lane*, 71 A. C. 911, *a picketing case,* carried the *Logan Valley* principle a step further and extended First Amendment rights insofar as picketing and a labor dispute were concerned, to a privately owned sidewalk which led to an individual store but which sidewalk was held open to access by the public.

The most recent case in this field before the Supreme Court of the United States is *Taggart* v. *Weinacker's, Inc.*, 90 S. Ct. 876 (March 9, 1970), which casts little light on the subject of this case. This also was a *picketing* case involving a shopping center but the decision did not discuss the general problem, merely concluding that in the light of an obscure record, the physical circumstances of the narrow sidewalk involved, the finding of the state court on obstruction of customers, coupled with the fact that only a bare remnant of the original controversy remained, that the writ should be dismissed as improvidently granted.

It is to be noted that each of the above cases, excluding *Marsh,* was a *picketing* case. In each case there was an activity being carried on which was consistent with and

directly related to the primary use to which the property was being put. In each of these cases there was an effort to communicate by a particular group to a particular group at a place which represented the object of protest and in each case the area selected presented the most effective point of persuasion. In *Marsh,* of course, full First Amendment rights were granted on the streets and sidewalks of a town which was wholly owned by a company as there was absolutely no place in that town in which First Amendment activities of any nature could be carried on without the consent of the landowner.

To bring the appellants in the presment case within the protection and under the umbrella of the above cases, we must either find under the *Marsh* theory that a shopping center has *all* of the attributes of a company-owned town, or under *Logan Valley, Schwartz-Torance, Lane* and *Taggart* that the activities of the appellants were consistent with and directly related to the purpose and use to which the property was actually being put.

Turning first to the *Marsh* concept:

Shopping centers are an historical and logical extension of a process which began when supermarkets and department stores developed. In the supermarket concept, grocery stores, butcher shops, bakeries, green grocers, tobacconists, liquor stores and delicatessens all combined under one roof for the convenience of customers and eventually dispensed practically every commodity attractive to the shopper, including sundries and dry goods. At the same time there was developing the department store concept in which small shops which sold ladies' dresses, men's haberdashery, cosmetics, jewelry, luggage, perfume, hardware, appliances, yardage goods, toys, sporting equipment, and furniture again combined for the convenience of the shopper under one roof. Finally, because we had become

an automobile oriented culture, all of these were brought together in the modern shopping center—some vast in size and concept such as the Inland Center, but mostly small and centered around a supermarket.

But large or small, a shopping center is not a town. Inland Center covers many acres. It caters to thousands of people each day, but large as it is, it is not a town. While the general language of *Logan Valley* clothes it for picketing purposes with the garb of "the functional equivalent of the streets and sidewalks of a normal business community," this is a legal fiction. One does not spend one's whole life in a shopping center as one may in a town, company or otherwise. The customers and employees of a shopping center leave it each day to return to "town" where they may properly be exposed to First Amendment communications on public streets, sidewalks and parks. It would be unreasonable to enlarge the company-town concept of *Marsh* to a shopping center for all First Amendment rights regardless of the size of the shopping center. The rationale of *Marsh* discussed above simply does not fit a shopping center.

Thus, the real question presented is, are the activities of the appellants consistent with and directly related to the primary purpose and use to which respondents' premises are being put under the *Logan Valley, Schwartz-Torrance, Lane* and *Taggart* concepts? We hold that the owner of a privately owned shopping center is not required to permit the unconsented use of his property for unrelated First Amendment activities by others for the following reasons:

I.

THE DESIRED USE IS NOT DIRECTLY RELATED IN ITS PURPOSE TO THE USE TO WHICH THE SHOPPING CENTER IS ACTUALLY BEING PUT.

Appellants would have us interpret the phrase "consonant with the use to which the property is actually put" to mean "consistent with the facilities available" or "consistent with the physical structure of the shopping center." This test is overbroad. There may be "facilities available" in a market, a department store, a hospital, a hotel, a private home or the waiting room of a business office. We interpret the phrase "consonant with the use to which the property is actually put" to mean some use directly connected with that particular property. Thus, in picketing cases, the use by others of the property involved is allowed for First Amendment purposes because that is the place which is the object of protest. This is a purpose directly related to the business of the shopping center. In addition, in picketing cases, there is the preferred status of picketing under Federal and California law as pointed out in *Schwartz-Torrance.* The reason *Logan Valley* and *Schwartz-Torrance* allowed picketing on the shopping center was that to do otherwise would be to immunize the shopping center, by the use of its large parking lot from any on-the-spot criticism of the economic practices of the businesses therein. This would deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion—the place of the business involved. The concept of criticism is explicit in *Shwartz-Torrance* and *Logan Valley.* There, the target of criticism was within the shopping center. In the instant case, there is no attempt to criticize Homart or any store therein.

Among other contentions, appellants contend that First Amendment rights may be exercised at every location

wherein they have been "traditionally" exercised. Union picketing and other protest communications have been "traditionally" exercised at the establishment whose policies are being protested. No such situation exists herein for these appellants merely wish to engage in general, unrelated First Amendment activities on respondents' property. The concept of "tradition" is dangerously vague. Most retail, commercial establishments are open to the public and in a literal sense places of "traditional" market activity. Yet, even appellants do not contend that they can carry on their unconsented activities in a grocery store or a meat market. While the soliciting of names on an anti-pollution initiative is a highly commendable activity, it can by no stretch of the imagination be construed as being directly related to the business of the shopping center. We cannot find that the solicitation of signatures for this initiative measure is generally consonant with or directly related in its purpose to the use to which the Inland Center is actually put.[1]

II.

THE AVAILABILITY OF OTHER EFFECTIVE ALTERNATIVE CHANNELS OF COMMUNICATION.

The record is clear that in the opinion of the appellants the shopping center is the most desirable place in which to solicit signatures for an initiative petition. We feel that the record supports this view. It is an attractive, pleasant and convenient place in which to communicate

1. This limitation on the *Marsh* principle was recognized by Judge Henry J. Friendly in *Powe* v. *Miles*, 407 F. 2d 73 at p. 80, where Judge Friendly refers to *Logan Valley's* extension of the principles of *Marsh* "in the context of union picketing of one of the enterprises located there."

their message.[2] However, alternative methods of solicitation and communication are available as pointed out in the statement of facts above. It was the very absence of such channels in *Logan Valley* which caused the court in that case to find that the state substantially hindered the communication of ideas which petitioner in that case sought to express. (*Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 323 [20 L. Ed. 2d 603, 88 S. Ct. 1601].) In *Schwartz-Torrance,* alternatives available were such that they would involve the danger of traffic tie-ups, confusion as to the object of the picketing and the requirements of larger signs and more pickets. This brings us back to the fact that every case decided to date involving shopping centers has been a picketing case. For other First Amendment activities such as those proposed by appellants in this case, the parties can conduct their programs, carry on their communications, disseminate their information and make their solicitations on publicly owned streets, sidewalks, parks, etc.—even though these may not be as desirable as respondents' property. As a matter of rather obvious public policy, First Amendment rights of communication of ideas by word of mouth should be exercised on public property. For an exception to this rule, a strong showing of need must be made. No such showing has been made in this case. To the contrary there are available other effective (although admittedly not as desirable) alternative channels of communication.

2. One is reminded of the contention made in *Adderley* v. *Florida, supra,* that the protesters there had a right to stay on jail property because the area was "particularly appropriate." To this contention, the court responded, "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *State of Louisiana, supra,* at 554-555 and 563-564, 85 S. Ct. at 464 and 480. We reject it again."

III.

THE POTENTIAL FOR OBSTRUCTION AND INTERFERENCE OCCASIONED BY THE EXERCISE OF UNRELATED FIRST AMENDMENT RIGHTS IN A SHOPPING CENTER WARRANTS A DENIAL OF THOSE RIGHTS THEREON.

Even when dealing with public property, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. (*Taggart* v. *Weinackers, Inc., supra,* 90 S. Ct. 876, 877; *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 320-321 [20 L. Ed. 2d 603, 88 S. Ct. 1601].)

Appellants point out that in *In re Hoffman, supra,* 67 Cal. 2d 845, and *Wolin* v. *Port of New York Authority,* 392 F. 2d 83, the courts expressly rejected the two tests previously discussed, i.e., that the proposed use must be related to the business of the property involved and that there not be available other effective channels of communication. However, *Hoffman* and *Wolin* are clearly distinguishable on their facts. In each case there was leaflet distribution concerning the United States involvement in Viet Nam. It is true that in neither was the activity related to the business of the property owner and in both there were available other effective channels of communication. However, the physical facts of the property involved create a clear distinction between these cases and the instant case. In *Hoffman,* the activities were being conducted in the Los Angeles Union Railroad Station which was then a great railway terminal serving three major railroads. In *Wolin,* the site of the activities was an immense bus terminal covering a full city block and serving over 200,0000 people per day. In these cases the court permitted the

unrelated First Amendment activities, pointing out that noise and confusion were characteristic of the normal operation of a railroad station or bus terminal, that the very nature of the operations were such that the proposed activities could in no way interfere with the normal use of the property or with the normal orderly carrying on of the business conducted therein and that the property involved was an appropriate place for expression of views. The court pointed out in *Wolin*, particularly, that the character and function of the place chosen for the exercise of First Amendment rights is an important factor affecting the limits of tolerable disruption and that while the Supreme Court had protected loud and boisterous conduct on a street used as a state house driveway during the day (*Edwards* v. *South Carolina*, *supra*, 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]) that similar activity would not receive the same treatment if it were conducted in other places where "order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation." (*Wolin*, *supra*, fn. 8, p. 90.)

Here, we feel that it is obvious that the normal activities carried on at the Inland Center can hardly be compared to those carried on in the New York Bus Terminal or the Los Angeles Union Station.

The normal orderly carrying on of business in a shopping center demands an entirely different standard of order and tranquility than the disorder, confusion and tumult to be found in a bus terminal or railroad station. The level or degree of tolerable interference between the two types of activities is so great that one set of rules cannot be made to apply to both situations.

The possibilities of the results of unrelated First Amendment activities for religious, charitable, political, social and economic purposes being carried on in the malls or on the walks, aisles, driveways and parking areas of shopping

centers (or for that matter of supermarkets or department stores) stagger the imagination. If appellants can do what they propose to do in this case, other obviously have the same right. One card table is a minimal obstruction, thirty or forty would destroy business and unduly interfere with the normal use of the property by other members of the public.

Appellants suggest that they be allowed to conduct their unrelated First Amendment activities subject to "reasonable regulations." When one contemplates the tens of thousands of shopping centers, large and small, and the large number of individuals or groups who may wish to use these premises for the exercise of unrelated First Amendment rights thereon, the problem of creating "reasonable regulations" for each case assumes epic proportions. The shopping center (or the supermarket) is "where the action is" as the citizens leave the decaying, traffic congested centers of our towns and cities and flock to the modern shopping centers with their ease of parking and other conveniences. However, merely by reason of this historic accident, we cannot turn shopping centers into miniature Pershing Squares, Union Squares or Hyde Parks. History, some of it of recent origin, has shown the irresponsibility of certain groups in exercising cherished First Amendment rights of freedom of communication and expression. Municipalities are peculiarly equipped to promulgate "reasonable regulations." But a holding that anyone may exercise his unrelated First Amendment rights on a shopping center subject only to "reasonable regulations" presents to the owners of the shopping centers policing problems of staggering proportions.

In any case such as this there is a clash between two conflicting constitutional rights—the right of the property owner to run his business without interference and the right of others to engage in First Amendment activities.

The court must accommodate these constitutional rights and look to each case to determine wherein the line has to be drawn. As the court pointed out in *Logan Valley*, a balance must be obtained which seeks to neither "substantially hinder—the communication of idea" nor "significantly interfere . . . with the use to which the [private] property is being put by both respondents and the general public." (*Logan Valley, supra*, p. 323.) Due to the brevity of the incident and the exemplary behavior of all connected with it, obstruction and interference in the instant case were minimal; nevertheless, they were "appreciable," (*In re Hoffman, supra*, fn. 6, p. 852), and the potential for obstruction and interference is clear.

We feel that the tests set forth above strike this balance.[3]

Applying the above standards to the facts in the instant case, the decision of the lower court was proper and the judgment of that court denying the injunction is affirmed.

GARDNER, *J.*

We concur:

KERRIGAN, *Acting P. J.*
TAMURA, *J.*

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3. We are aware of a three-sentence pro curiam opinion of the Supreme Court of the State of Minnesota which reversed a trespass conviction of individuals who had entered a shopping center for the purpose of distributing a pamphlet or tract on behalf of the candidacy of certain persons in a political campaign. The court said, "On May 20, 1968, the case of *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza, Inc.* [citation omitted] was decided by the Supreme Court of the United States. The decision is controlling over the facts involved in the case now before us. On the basis thereof the convictions must be reversed." (*State* v. *Miller*, 280 Minn. 566, 159 N. W. 2d 895.)

All we can say is that for the reasons stated in this opinion we must respectfully disagree with the simplistic approach taken by that court.

APPENDIX D.

OPINION OF THE CALIFORNIA SUPERIOR COURT, NOVEMBER 14, 1969.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
For the County of San Bernadino.

ROGER JON DIAMOND, et al., etc., *Plaintiffs,*
vs.
FRANK BLAND, et al., etc., *Defendants.*
No. 149671.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

Before HON. JAMES E. CUNNINGHAM, SR., *Superior Court Judge,*

Department X, San Bernadino, California.

November 14, 1969.

The Court: Gentlemen, as we all know, for the past fifty years there has been a constant erosion of property rights. First of all, in favor of public rights such as health and safety laws. Next, licensing ordinances and after that zoning ordinances. For the past fifteen years there has been a considerable amount of decisional law diminishing property rights in favor of personal or individual rights including First Amendment Rights as have been referred to. But in all of the cases determining the validity of of these erosionary laws on property rights, the Court of

necessity has had to balance the equities, so to speak, had to weigh the prejudice to the property right to the greater gain of the public or individual right.

As the law now stands many, many things are permitted on what is public property: Demonstrations, solicitations, passing out of leaflets. Of course, the first was the picket line in front of private property. How, many of these things merchants would like to be free of, many of these restrictive type things. Consequently, merchants have invested tremendous sums of money for leasehold interests in order to carry out what the Court feels is the moral obligation of the merchant to protect his customer from annoyance or harassment, jostling. In other words, he has a need to afford comfort to his prospective customer. Many merchants have found that when they locate their businesses contiguous to public property, they cannot do these things they would like to do for the comfort and well being of the customer and that is the reason, in great measure, that the shopping center movement has been so great in the post-Korean years. Plus the fact that the Court takes judicial knowledge that urban areas have been blighted. It is difficult for any one merchant to improve appreciably his place of business because he doesn't know what his neighboring business people will do or whether they will also invest the money. So what with the blighting of the urban area, their deterioration, the more permissiveness of conduct on the public sidewalk and street that is injurious to his business, so he feels, has caused him to band together with his other merchants and move into a completely privately owned shopping center. Evidently, though, when it came to a strike dispute, the merchant wasn't able to get away with his private property argument. In the Logan case the pickets were permitted on private property, shopping center property, but there the Court was very careful to point out that there was a privy, there was a causal connection between the permitting

of the pickets and the diminution of private property rights because it was the only way that the union in exercising its heretofore established right to picket, could point out the alleged offending employer. The Court gave no indication that for any other purpose it would tear down or destroy the last vestiges of the capitalistic system and also a constitutional right to have the peaceful enjoyment of real property or leasehold interest therein.

In our case at Bar, the Court is of the opinion that the Logan decision of the United States Supreme Court has no applicability because I find no privy between the plaintiff in his attempt to induce the merchants' customers to sign his petition as having any relationship whatsoever with the merchants' right to do business.

The shopping center has demonstrated its ability to operate a more desirable entity for the conduct of mercantile business by virtue of the acceptance it has received from the public. The Court heard evidence today and took judicial knowledge of the fact that one of the greatest people getters in San Bernardino County was the Shopping Center and why are the people going to the shopping center in such droves? A partial reason is that there is some redevelopment taking place in what was formerly the downtown section of San Bernardino but that isn't the sole reason. The people are traveling, according to the testimony, from a hundred miles away, from Barstow and they are coming down because the shopping public, first of all, wants value for the shopping dollar and wants and has demonstrated its desire for an environment to shop in that is pleasant, clean and interesting. I might even say entertaining because promotions have evidently been popular because of their multiplicity. So, in our case when the Court balances the prejudice to be done to the merchant as against the gain to be obtained by the plaintiff, I feel the greater weight is on the side of the defendants.

In concluding, let me give you the Court's answer to one thing that was pointed up here during the trial and that is, to wit: The plaintiffs First Amendment Rights, the right to circulate a petition in accordance with the law providing for the initiative is being denied him because unless he can get into the shopping center where he can meet large crowds of people, he cannot complete his petition within the time prescribed by law to complete it.

Well, gentlemen, we have a Legislature in the State of California that is fully attuned, in my opinion, to the wishes and the desires of the people. If the shopping centers, because petitions could not be circulated there, were preventing the initiative from being effective and which it always should be because that is a great American right that we have, then, I would say we should prevail upon the Legislature to extend the time within which to collect the signatures so that they might be obtained where the Courts have already determined petitions might be circulated and signatures obtained. That would take thirty days or sixty days longer to do it on public property such as the street corner. Change the law if necessary but don't infringe again on another property rights that have in the past ten years, as I initially stated, suffered tremendous erosion.

The prayer of the petition for temporary injunction denied as to all named defendants. Both parties to bear their own costs. The Court will be in recess.

Mr. Gresham: Thank you, your Honor.

The Court: Gentlemen, since making my order denying the request for the temporary injunction I understand you have had some conversation and wish to enter into a stipulation?

Mr. Diamond [for Plaintiffs]: Yes, your Honor. The stipulation will be that your order covers both the application for the preliminary injunction as well as the permanent

injunction and that your order was denial of both applications and that the order is final for purposes of an appeal.

The Court: Do you join in the stipulation?

Mr. Gresham [for Defendant Homart Development Co.]: Yes, your Honor.

The Court: The other two attorneys are not present but I think you might agree that they are not the real parties in interest as is the shopping center per se and the plaintiffs.

APPENDIX E-1

PETITION FOR STAY OF REMITTITUR, JANUARY 5, 1971.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROGER JON DIAMOND, et al.,
Plaintiffs-Appellants,
vs.
FRANK BLAND, etc., et al.,
Defendants-Respondents.

L. A. 29803

PETITION FOR STAY OF ISSUANCE OF REMITTITUR AND ORDER THEREON.

TO: THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA:

1. Plaintiffs in the instant action sought an injunction restraining this defendant, among others, and its agents, from annoying, bothering, molesting or injuring plaintiffs, their agents and persons soliciting signatures on petitions and disseminating information relative thereto on the premises of the Inland Center, provided that such activities were orderly and consisted only of the solicitation of signatures and the dissemination of information relative to the petition.

2. Following trial, the Superior Court declined to grant the injunction which plaintiffs sought. This ruling was upheld on appeal by the Fourth District Court of Appeal, Division Two.

3. This Honorable Court granted hearing and now by its opinion has ordered that the relief sought by plaintiffs be granted, subject to reasonable regulations.

4. Petitioner believes the ruling of this court to be in error and will petition for a writ of certiorari in the United States Supreme Court (See Declaration of Allen B. Gresham) within the statutory time period.

5. It is respectfully submitted that pending action by the United States Supreme Court on said petition, the public interest is best served by mintaining the status quo. Such action will avoid confusion and possible conflict which may grow out of a situation in which the regulations adopted pursuant to the ruling of this court could later be rendered unnecessary by action of the United States Supreme Court. The attendant uncertainty contains the seeds for ill will and potential violent behavior.

6. It is also respectfully submitted that should the United States Supreme Court reach a contrary conclusion to this Honorable Court, the stay of issuance of the remittitur thereby maintaining the status quo will eliminate the necessity for litigation concerning the reasonableness of the regulations which may be adopted by one or more of the multitudinous shopping centers throughout the State of California.

7. Petitioner has already received a request to use the mall for solicitation purposes (see letter dated December 21, 1970 from Roger Jon Diamond—Exhibit "A") so it is certain these problems will arise.

8. The relief sought herein is consistent with the procedure provided in the Federal Rules for Stay of Mandate and is reasonable and appropriate both as to application and time period involved.

9. The opinion of this Honorable Court was filed on December 16, 1970 and will become final 30 days thereafter.

The Clerk, unless otherwise ordered, will issue the remittitur upon such decision becoming final.

WHEREFORE, it is respectfully submitted that this Honorable Court stay the issuance of the remittitur in this action pending action by the United States Supreme Court on the petition for writ of certiorari, said stay to continue until final disposition by the United States Supreme Court in the event certiorari is granted but to terminate 30 days after notification that it has been denied.

Dated: January 5, 1971.

Lederer, Fox and Grove and
Lonergan, Jordan, Gresham
& Varner,

By /s/ Allen B. Gresham,
Allen B. Gresham,
Attorneys for Petitioner, Homart Development Co.

ROGER JON DIAMOND
Attorney at Law
15415 Sunset Boulevard
Pacific Palisades, California 90272

454-1351

December 21, 1970

Allen B. Gresham, Esq.
Lonergan, Jordan & Gresham
398 West Fourth Street
San Bernardino, California 92401

Re: *Diamond* v. *Bland*
L. A. 29803

Dear Mr. Gresham:

I am sure that you are aware of the Supreme Court's decision filed on December 16, 1970, which reversed the trial court's decision in this case, and which holds that my clients, including People's Lobby, Inc., have a right to exercise First Amendment rights on the premises of Inland Center in San Bernardino, owned by your client, Homart Development Company.

As you recall, this case arose last year during my clients' unsuccessful campaign to secure enough signatures on two anti-pollution initiative petitions in order to qualify it for the State ballot.

The People's Lobby has filed a new anti-pollution initiative petition, a copy of which I have enclosed for your convenience. Accordingly, the People's Lobby once again desires to use the premises of Inland Center in order to secure signatures on the petitions and in order to engage in related activities. Furthermore, in addition to activities directly related to the initiative petition, the People's

Lobby wishes to conduct other activities on the premises of Inland Center with respect to matters of air pollution. For example, People's Lobby wishes to hand out literature and distribute other material. Of course, the People's Lobby's representatives will conduct themselves in an orderly manner and will in no way obstruct any business of the Center.

I am advising you of these facts just to let you know what the intentions of the People's Lobby are. We intend to come onto the premises as soon as the remittitur issues in the above-captioned matter.

We would be glad to consider any reasonable regulations that you would like us to follow in connection with these activities. Let me hear from you as soon as possible.

Very truly yours,

/s/ Roger Jon Diamnod
Roger Jon Diamond

RJD/rr

enclosure

APPENDIX E-2.

DECLARATION IN OPPOSITION TO PETITION FOR STAY OF REMITTITUR.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ROGER JON DIAMOND, et al.,
Plaintiffs-Appellants,
vs.
FRANK BLAND, etc., et al.,
Defendants-Respondents.

L. A. 29803.

Appeal from the Superior Court of the County of San Bernardino HONORABLE JAMES E. CUNNINGHAM.

DECLARATION OF ROGER JON DIAMOND IN OPPOSITION TO PETITION FOR STAY OF ISSUANCE OF REMITTITUR.

I, Roger Jon Diamond, declare as follows:

I am an attorney admitted to practice in California, and am one of the plaintiffs and appellants in this case. I, along with two other persons, was a proponent of two initiative petitions which were involved in this case. These two initiative petitions were attached to the complaint in this action as Exhibits "B" and "C" (Clerk's Transcript, pages 9 through 24). The two initiative petitions would have appeared on the November 3, 1970, California General Election Ballot had they received the required number of signatures. Many more signatures would have been secured

on these petitions had the trial court in this action not denied the relief requested.

In December 1970, I and three other persons, as proponents, filed a new anti-pollution initiative petition with the Secretary of State and Attorney General, and on December 7, 1970, the Attorney General prepared and returned to me and the other proponents the title and official summary of the initiative. The People's Lobby, Inc., sponsors of the two previous initiative petitions and a plaintiff-appellant here, is once again sponsoring this initiative petition drive. I have attached copies of the new initiative petition to this declaration for the convenience of the Court.

According to the Elections Code, I and the other proponents, and the People's Lobby, Inc., will have 90 days from December 7, 1970, in which to collect the necessary signatures of registered voters (approximately 325,000). In other words, the petitions with the required number of signatures must be filed by March 7, 1971. The law, however, does provide for an additional 60-day supplemental period beyond the first filing date.

I, the other proponents of this initiative, and the People's Lobby, Inc., wish to take advantage of this Court's ruling in order to have access to Inland Center for the purpose of gathering signatures on the new anti-pollution initiative petition.

If this Honorable Court grants the Petition to Stay the Issuance of the Remittitur then plaintiffs-appellants will be denied the fruits of their victory.

In addition to the present initiative petition now being circulated, it is my intention and the intention of People's Lobby, Inc. to file, sponsor and circulate still additional initiative petitions in the future, as well as exercise other kinds of activities also protected by the First Amendment

to the United States Constitution. That is, my opposition and the opposition of other plaintiffs-appellants in this case to the Petition for Stay of Issuance of Remittitur is not based solely on the fact that a new initiative petition is being circulated, but upon the further fact that other activities (with no time limit, such as distribution of anti-pollution literature and other kinds of literature) will also be undertaken by People's Lobby, Inc., on the premises of Inland Center, which is, as the Court recognized, the largest shopping center in the County of San Bernardino.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 7, 1971, at Pacific Palisades, California.

/s/ Roger Jon Diamond,
Roger Jon Diamond.

APPENDIX E-3.

ORDER OF THE CALIFORNIA SUPREME COURT, JANUARY 14, 1971.

L. A. No. 29803.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK.

DIAMOND, et al.,

VS.

BLAND, AS SHERIFF, ETC., et al.

Application for stay of issuance of remittitur DENIED. This order is final forthwith.

Filed Jan. 14, 1971. G. E. Bishel, *Clerk.*

/s/ Not Legible,

Deputy,

/s/ Wright,

Chief Justice.

APPENDIX E-4.

JUDGMENT, JANUARY 28, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

For the County of San Bernardino

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., *Plaintiffs and Appellants,*

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ET AL., *Defendants and Respondents.*

No. 149671.

FINAL JUDGMENT (Permanent Injunction).

To: Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino; Homart Development Company, a corporation:

Upon issuance of the remittitur by the Supreme Court with respect to its written opinion in this case filed on December 16, 1970,

IT IS HEREBY ORDERED that defendants Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of

Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino and Homart Development Company, a corporation, be, and they are hereby permanently enjoined and restrained from: Interfering in any way with the right of Roger Jon Diamond, William Duxler or the People's Lobby, Inc., to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center.

Dated: Jan. 28, 1971.

James E. Cunningham, Sr.,
Judge.

APPENDIX E-5.

ORDER OF THE CALIFORNIA SUPERIOR COURT, JANUARY 28, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

For the County of San Bernardino.

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., *Plaintiffs,*

vs.

FRANK BLAND, et al., *Defendants.*

No. 149671.

ORDER STAYING EXECUTION OF JUDGMENT.

The motion of defendant Homart Development Company for an Order staying execution having come on regularly for hearing before the undersigned this 28th day of January, 1971 at the hour of 10:00 A. M. upon notice duly and regularly served and plaintiffs appearing by Roger Jon Diamond, their attorney and defendant Homart Development Company appearing by Lonergan, Jordan, Gresham & Varner by Allen B. Gresham, its attorneys, and evidence, oral and documentary, having been presented and the matter having been argued and submitted and good cause appearing therefor;

IT IS HEREBY ORDERED that defendant's motion be and the same is hereby granted.

IT IS FURTHER ORDERED that execution of judgment herein be stayed for a period of 30 days from the date of this order.

Dated: Jan. 28, 1971.

/s/ James E. Cunningham, Sr.,
James E. Cunningham, Sr.,
Judge, Superior Court.

APPENDIX E-6.

ORDER OF THE CALIFORNIA SUPERIOR COURT, FEBRUARY 26, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

For the County of San Bernardino

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC.,
Plaintiffs and Appellants,

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ET AL.,
Defendants and Respondents.

No. 149671.

STIPULATION AND ORDER THEREON.

Plaintiffs and Defendant Homart Development Co. (Homart), by their respective attorneys, stipulate and agree as follows:

1. Pursuant to the decision in this case by the California Supreme Court filed on December 16, 1970, judgment was entered by this Court on February 1, 1971. The execution of judgment was stayed for good cause shown for a period of thirty days by order of this court dated January 28, 1971.

2. Homart intends within the time prescribed by law to file a petition for writ of certiorari with the United States Supreme Court to review the decision of the California

Supreme Court. Plaintiffs' position with respect to the petition is that they do not oppose the grant of certiorari because they believe the decision of the California Supreme Court is, with one exception, correct, and should be of national effect. The one exception is the California Supreme Court's implication that *Homart* may impose "reasonable regulations" on the exercise of First Amendment rights at Inland Center. Plaintiffs believe that this is an erroneous proposition of law.

3. For the reasons stated in paragraph 2, Homart and plaintiffs agree, pursuant to California Code of Civil Procedure section 681a, to entry of an order continuing the stay of execution of judgment, without posting of a stay bond, until March 16, 1971 to permit the filing of a petition for writ of certiorari, and in the event the petition is filed, until final disposition thereof by the United States Supreme Court.

February 26, 1971

/s/ Roger Jon Diamond
Roger Jon Diamond
Attorney for Plaintiffs

February 26, 1971

/s/ Allen B. Gresham
Allen B. Gresham of Lonergan, Jordan, Gresham & Varner
Attorneys for Defendants

ORDER.

Pursuant to the above Stipulation, and for good cause shown, IT IS SO ORDERED.

Dated: February 26, 1971

/s/ James E. Cunningham, Sr.,
Judge.

APPENDIX F.

OPINION OF THE RHODE ISLAND SUPERIOR COURT IN HOMART v. FEIN, AUGUST 6, 1970.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

Kent, Sc. Superior Court.

HOMART DEVELOPMENT COMPANY,

vs.

DANIEL FEIN, JOSEPH TRAUGOTT, JOHN POWERS.

70-275.

August 6, 1970.

(P. M. Session.)

LAGUEUX, *J.*: This matter is before the court on a prayer for a temporary injunction by Homart Development Company against Daniel Fein, Joseph Traugott, John Powers and the Rhode Island Socialist Workers Party. The claim is that the defendants individually as candidates for national and state office under the banner of Rhode Island Socialist Workers Party have entered onto premises owned by the plaintiff and leased by it to tenants, for the purpose of soliciting signatures on primary nomination papers and exhorting customers of these tenants to support their views and that they have been denied permission to use these premises for that purpose and that they have indicated that they will continue to use the premises for that purpose unless enjoined temporarily and permanently in accordance with the prayer. So the case is before the court now on a request for a temporary injunction.

The basic test which is applied in determining whether a temporary injunction shall issue is whether or not there is a reasonable probability that the plaintiff will prevail at the hearing on the merits. This case does not present many factual disputes. It essentially presents a basic question of law. However, I think it's necessary for the court to make some preliminary findings of fact. The premises owned by the plaintiff consist of some forty-five acres of land in the city of Warwick containing some seventy-three stores which are leased out. The unusual feature of this shopping center is that it is essentially under one roof in two levels with a minor exception; namely, there is a Sears Auto store in another location on the premises and another minor building. The parking area is very large. This shopping area is open to the public between 9:30 in the morning and 9:30 in the evening, six days a week, and on Sundays some of the businesses in the area are open although not all. Probably the majority of them are not open on Sunday. The testimony is that on an average day 18,000 people attend the area for various purposes. The plaintiff, Homart Development Company, which operates eight of these centers throughout the country, has a national policy and I find that they have a local policy, non-discriminatory in effect, that no political candidates will be allowed to use their premises for solicitation purposes. That means that no candidates will be allowed to use their premises for solicitation of signatures, votes or other campaign purposes. Plaintiff also has a general policy not to allow outside groups, and by outside groups I mean groups other than their own tenants, to use the premises unless the use will be for a display or some sort of an activity which will be of some attraction to the general public, attracting people to the area. Examples of that policy in effect have been for example, to allow use of the premises for art exhibits by gifted children. Presumably this will attract people who are interested in

looking at these things and maybe also, in the process, bring them into some of the stores. Camping exhibits and ecology exhibits were conducted and even in one instance, it allowed a radio station to conduct a program whereby people could drop by and leave off a gift for soldiers in Viet Nam.

The defendants, Daniel Fein, Joseph Traugott, and John Powers, are candidates for the offices of United States senator, governor, lieutenant governor in the State of Rhode Island (not necessarily in that order) under the aegis of the United States Socialist Party. Their purpose for using the premises in question is to secure signatures on their nomination papers so that they may secure the necessary five hundred to place them on the ballot in November and also to expound on their political views in an effort to solicit support in the coming election in the event they are on the ballot. Also the testimony indicates, if they are on the ballot, they intend to use the premises at some later time for campaigning purposes; namely, to meet people, pass out leaflets and to expound their views. Their reason for wanting to use this particular area is that it's the most convenient place to meet a lot of people, a lot of Rhode Islanders, to secure signatures and to secure support. The defendants used the premises on three occasions in late July 1970. Some or all used it on all three occasions. On one occasion they used it for approximately one hour and were asked to leave. The area they used on that occasion was marked on an exhibit, Plaintiff's Exhibit "1" in ink. There was testimony that they returned on another occasion and used the other side of the building, were asked to leave and left and that they returned on a third occasion and at that time were served with a temporary restraining order.

The defendants assert, in substance, that they can use these premises for these purposes because of the guarantee

of the right of free speech and to assemble in the First Amendment of the United States Constitution. I think it may be well to point out that the right of free speech and all first amendment rights are not absolute and that they may be subject to some regulation at times. There are many examples of this. These rights may also come in conflict with other rights equally well guaranteed by the United States Constitution. For example, in the courtroom on the criminal calendar we continually have the problem of balancing the first amendment right of free press against the right of the particular defendant bfore the court to a fair trial. In the area of free speech, there have been limitations imposed by the United States Supreme Court enunciating a clear and present danger doctrine. Limitations are imposed by libel laws enacted by legislatures and by the common law. A person may be free to speak but if he speaks in a certain way he may be criminally or civilly liable, so that the right of free speech is not absolute and this is particularly so when the right conflicts with another constitutional right. We have here involved another constitutional right and that is the right to use one's own property as one see fit subject to reasonable regulations made in accordance with due process of law. The due process clause of the United States Constitution is applicable both to the states and to the federal government. It guarantees not only life and liberty but property. I should note here that this is not a discrimination case. There is no evidence before the court that these particular defendants have been discriminated against by application of any policy enunciated by the plaintiffs. In other words, there is no evidence that other political parties, other candidates, have been allowed to use these premises to solicit signatures or for campaign purposes.

The crux of the situation is that the Midland Mall in Warwick is private property. Some people may say it's

quasi public property. The use of the word "quasi" to me is meaningless. It's a means of covering up or sloganizing the basic concepts and ideas, which must be investigated in order to make a proper determination of the merits of a controversy such as this.

This property is private. However, the public is invited, but the public is not invited for all purposes but rather for a limited purpose—namely, to shop and to perform functions incidental to the operation of the center. In other words, the public is invited to come upon the Midland Mall for reasons directly connected with the profit-making motives of the owners of the mall. The presence of the defendants there is not pursuant to that invitation. Defendants are there for their own private purposes and not for any purpose directly related to the reason that this shopping center exists.

Cases have been cited to me by counsel for the defendants and discussed by both counsel, to attempt to sustain the proposition that the defendants have a right to be there, to speak there, to solicit support there from customers. It would be well to simply discuss these cases very briefly. The landmark case is *Marsh* v. *Alabama* where the United States Supreme Court held that in a company-owned town where there were no other reasonable alternatives available, a Jehovah witness could not be prevented from disseminating literature in accordance with that person's religious belief. That case is not applicable to the situation here. We are not dealing with a company-owned town. We're not dealing with a situation where there are no reasonable alternatives. The other landmark case is the *Logan Valley Plaza* case also decided by the United States Supreme Court, which stands for the proposition that in labor disputes union people interested in that labor dispute can picket a lessee in one of these

shopping areas. I have no dispute with that case. I think it's well decided but again it is not applicable to this situation. The two other federal cases cited to me by Mr. Stanzler, I find inapplicable. The case of *Tanner* v. *Lloyd* which is a district court case in Oregon was also cited to the court. I don't find the court's decision convincing. I am impressed by the reasoning in the case of *Diamond* v. *Bland* decided by the Court of Appeals for the 4th District, 2nd Division, State of California which was filed on May 25, 1970. A copy of that decision was made available to me by Mr. Wells and a copy of that decision will be filed with the records of this case in the event that it is not reported elsewhere. It would serve no useful purpose for me to go over all the points made in that decision by the three judges who decided it. I would probably come out second best in trying to articulate their views which I agree with. They have done the subject justice.

An important point to keep in mind is that there were reasonable alternatives available to these defendants to pursue their political hopes and aspirations. There are other places where they can solicit signatures. They can campaign in other shopping centers when given permission by the owners which has been given to these defendants in the past. The owners of real property and shopping centers can decide for themselves. There are public parks available. There are sidewalks, public areas of all sorts and house to house canvassing available. This court is not a stranger to political campaigning. When Mr. Fein was on the stand I was reminded that six years ago I was a candidate for the office which he is now seeking and I recall campaigning all over the state but always by permission of those who owned private property.

The consequences of allowing this conduct in this particular case I think would be staggering. If, at this time,

the court allowed these three individual defendants and this particular political party to use the premises at the Midland Mall for soliciting signatures and for campaigning purposes then certainly all other candidates for office would be privileged to do likewise even at the same time. It could be chaotic in that area. The court here must indulge in a balancing process. It must balance one constitutional right against another. It must balance the constitutional right to freely speak and to assemble for redress of political grievances against the policy of the plaintiff which is non-discriminatory in nature and effect, which it chooses to promulgate for the protection of its legitimate business interest and protectable property rights. The defendants first amendment rights can be exercised elsewhere as effectively as it could be exercised on plaintiff's premises. It may not be as convenient but the final result can be as effective. Therefore, the court is striking a balance and both rights are allowed to co-exist. The temporary injunction prayed for may issue enjoining the defendants from soliciting signatures for their nomination papers on the premises of the plaintiff and also from campaigning for political office on those premises. Present an order.

(Adjourned.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,

Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Homart Development Co. prays that a writ of certiorari issue to review the opinion, and judgment issued pursuant thereto, of the Supreme Court of California entered in this case on December 16, 1970.

OPINIONS BELOW

The divided opinion of the California Supreme Court is reported as *Diamond, et al.* v. *Bland, et al.*, 3 Cal. 3rd 653, 91 Cal. Rptr. 501, 477 P. 2d 733 (1970), and is printed at Appendix B, pp. A4-A21. The opinion of the California Court of Appeal, Fourth Appellate District, is reported under the same name at 8 Cal. App. 3rd 58, 87 Cal. Rptr.

97 (1970), and is printed at Appendix C, pp. A22-A43. The oral opinion of the California Superior Court for the County of San Bernardino is unreported and is printed at Appendix D, pp. A44-A48.

JURISDICTION

The opinion of the California Supreme Court was filed on December 16, 1970. Appendix B, pp. A4-A21. A motion for a stay of remittitur was denied by that court by order dated January 14, 1971. Appendices E-1, E-2 and E-3, pp. A49-A57. Judgment was thereafter entered by the California Superior Court on February 1, 1971 and its execution stayed to permit the filing and disposition of this Petition. Appendices E-4, E-5 and E-6, pp. A58-A63. This Court has jurisdiction under 28 U. S. C. § 1257(3).[1]

QUESTION PRESENTED

May the owner of a shopping center be compelled, in derogation of his Fifth Amendment property rights, to have part of his private commercial property confiscated for the use of those who wish to engage in any free speech activities thereon notwithstanding that (1) the activities are unrelated to any business of the center and (2) there are effective alternative locations in which to engage in such activities?

1. The judgment is a final one for purposes of review by this Court. *Market Street R. R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551-2 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as indirectly Section 602(1) of the California Penal Code and Ordinance 2941 of the City of San Bernardino, all of which are set out in Appendix A, pp. A1-A3.

STATEMENT OF THE CASE

Homart Development Co. (hereafter "Homart") is the owner of shopping centers throughout the United States including one located at San Bernardino, California called the Inland Center. Respondents are People's Lobby, Inc., a non-profit California corporation engaged in a continuing process of securing signatures on varied initiative petitions and related activities; Roger Jon Diamond, its attorney; and William Duxler, a volunteer worker for People's Lobby on its initiative campaigns. Appendix B, pp. A4-A5; Appendix C, p. A23.

Inland Center is a private shopping center.[2] Homart has made a substantial, continuing investment in the Center in order to attract potential customers to, and encourage them to do business with, the establishments maintained there. The Center represents a capital investment by Homart of approximately $7,000,000. There is a large parking area provided for customers only and a totally covered, bi-level shopping mall containing three major department stores and seventy-two tenant stores. A continuous expenditure is required for advertising, an extensive inventory of quality merchandise and business promotions and displays to induce prospective customers to come to the Center. A considerable investment is also

2. The Center is clearly marked and preserved as private property. Each night, for example, the interior mall area is locked and access denied the public. The Center is also surrounded with a chain-link fence and all the entrances thereto are posted with a sign indicating that the area is private property and that admission is subject to revocation. C. T. 76-7 (References to "R. T." and "C. T." are to the Reporter's Transcript and the Clerk's Transcript, respectively, of the proceedings in the California Superior Court).

necessary so that, once having been attracted to the Center, potential purchasers will fully utilize its various shopping facilities; the Center must be considered as a pleasant, conducive place to shop without disruption and interference. It is for this reason that the mall area is designed to be virtually indistinguishable from the selling areas of the stores[3] and shoppers there provided with controlled temperatures, piped-in music, restroom facilities and benches and receptacles placed on an attractive thirty-two foot wide, carpeted common aisleway. It is for this reason also that Homart and the tenant stores expend over $165,000 annually to provide the varied services, such as security, maintenance, insurance, utilities, air conditioning, taxes and licenses, and so on, necessary to operate the common areas of the Center. Appendix B, p. A5; Appendix C, p. A24; R. T. 86, 103-104.

Since the sole purpose of Homart's substantial investment in Inland Center is to obtain and preserve the patronage of the public, all activity on Center premises which does not directly promote its commercial purposes is forbidden. This prohibition is one which applies with equal force to both Homart, its tenants and strangers alike.[4] The restriction is one enforced nationally by Homart without discrimination. Non-commercial conduct is barred because it would unavoidably disrupt and distract shoppers, and appropriate their limited purchasing time, with matters unrelated to Center business. It would both burden the

3. The tenant stores have an obstructed frontage on, and their displays and merchandise are easily visible from, the mall common aisleways. There are also three kiosks, or leased mall sales booths, actually located in the middle of the aisleways. Appendix B, p. A5; Appendix C, p. A24, C. T. 74-5.

4. As a specific condition of the tenant agreements with Homart, under which Homart receives a percentage of the tenant sales, it is agreed that all non-promotional activity on the mall common areas is prohibited. This condition is strictly enforced. C. T. 81; R. T. 99, 102-303.

facilities of the Center and detract from its sales. As a result, although Inland Center is besieged with many calls each week from various worthwhile (and not so worthwhile) religious, charitable, commercial and political groups seeking to use the Center for a multitude of personal reasons, all such conduct has been uniformly prohibited on Center property. Appendix B, p. A5, Appendix C, pp. A24-A25.[5]

Accordingly, when Respondents sought to use the facilities of the Center to solicit signatures and disseminate information with respect to two anti-pollution initiative petitions, their request was denied. Such a use involved no dispute with, nor was designed to benefit, either Homart or its tenants. The Respondents' objective was one which admittedly could have been achieved through numerous alternative means and at numerous other effective locations.[6]

---

5. The desired uses range from political candidates such as the late Senator Kennedy, Senator Tunney, and Governor Reagan to geranium sellers, vacuum cleaner demonstrators and individuals collecting money for themselves or organizations they do not actually represent. The prohibited activities include those sought by tenants such as Sears, Roebuck and Co., churches, fraternal groups, environmental organizations, the Army, the United Fund, the Salvation Army and others "wishing to do everything that you can virtually imagine". C. T. 81-2, R. T. 99-102, 109-110.

6. Solicitation of signatures could have been engaged in on the abundant public sidewalks, public parks and other public facilities readily available in the San Bernardino area as well as at public affairs such as parades. Other potential arenas which admittedly were available included the exterior of local businesses, houses of worship, entertainment centers, sporting events and military installations. Communication with the public could also have been obtained through newspapers, radio and television, telephone, door-to-door contacts, bumper stickers and mailings. In some instances these alternatives were too expensive or inconvenient for Respondents; Respondents utilized other alternatives effectively; in further cases arrangements were just being made to utilize such tactics; and, in still other cases, there was no attempt made by Respondents to capitalize on such possibilities. Appendix B, p. A14; Appendix C, pp. A26-A29; C. T. 83; R. T. 13, 16-22, 26-28, 127-131.

Nevertheless, on October 30, 1969, during one of the more congested periods at Inland Center, Duxler and several other individuals representing People's Lobby set up a card table in the enclosed mall area of the Center. There they proceeded to solicit signatures, distribute information, pass out bumper stickers, collect donations and affix a sign describing their purpose to the Center directory. A crowd of shoppers, diverted from their shopping, soon congregated. The crowd attracted the attention of one of Homart's security officers who requested that such activities cease. Duxler and the others then took down their card table and left the mall area, only to resume such activities on the exterior sidewalk. Again, the security officer requested that they leave and this time they did. If there had not been compliance with the requests to leave, police assistance would have been sought pursuant to San Bernardino Ordinance 2941[7] and the California Penal Code trespass provision.[8] Appendix B, pp. A6, A7; Appendix C, pp. A25-A27.

Respondents thereafter filed a complaint for injunctive relief and prayer for declaratory relief against Homart, its agents and various San Bernardino city and county officials alleging that the refusal to permit the use of Center premises was in violation of their constitutional rights. The California Superior Court denied a request for a temporary restraining order and, after a full hearing,

7. San Bernardino Ordinance 2941 (Appendix A, pp. A2-A3) provides that "for the immediate preservation of the public peace, health and safety" and to regulate "the congregating and loitering on the malls, parking lots and open areas of . . . shopping centers and business premises", it is a misdemeanor for a private person to enter or remain upon such premises without the consent of the owner thereof.

8. California Penal Code Section 602(1) (Appendix A, p. A1) provides that a trespass includes "[e]ntering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

judgment was entered denying both preliminary and permanent injunctions. This judgment was affirmed by a unanimous California Court of Appeal, Fourth Appellate District, and then, in turn, reversed by a divided California Supreme Court. Both courts recognized that the case presented "a constitutional question of first impression" (Appendix B, p. A4; Appendix C, p. A23) and, accordingly, issued thorough, carefully-considered opinions.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Violates Homart's Rights Under the Fifth and Fourteenth Amendments

The State has violated Homart's Fifth and Fourteenth Amendment rights by appropriating part of its property without compensation. The decision below compels Homart, the owner of a private shopping center, to permit the exercise of *any* free speech activities on its specially developed and expensively maintained commercial property. Such activities must be tolerated notwithstanding that they may have no connection whatsoever with the views of the center's owner or occupants or with the conduct of their businesses. Homart is thus required to provide, free of charge, its valuable facilities to be utilized in a manner that will distract and even drive away those very customers it has attracted to Inland Center. Homart is obligated, in effect, to subsidize a competing use of its property.

The public comes to Inland Center because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the Center is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the normal sales activities of the Center. It is for this very reason that even the tenant stores, apart from the kiosks which pay for the privilege, have been prohibited from utilizing the common aisleways of the mall for their own purposes. To now appropriate

Homart's property for the unrelated activities of others is truly "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 333 (Black, J., dissenting).

This substantial deprivation of Homart's rights is one that cannot be obviated by "reasonable regulations". Indeed, the problem of devising any such regulations is one which "assumes epic proportions . . . [and] presents to the owners of shopping center policing problems of staggering proportions". Appendix C, p. A42. The shopping center owner would, for example, be required to assume the recognized responsibilities of a well-trained and equipped governmental body: to determine and enforce the appropriate time, place and nature of an enormous volume of desired uses; to provide the attendant maintenance and security services free of charge; and to assume the risk of any potential disruption or damage liability. And he would be required to assume these obligations, and the concomitant loss of business that would result from permitting competing uses, even though there may be no means by which he can, through his own actions, remove the communicants' source of discontent. Homart here cannot agree, for example, to any picketing union's demands, remove any offending merchandise, or engage in any other requested action to terminate Respondents' desired activities. Instead, it must suffer the substantial and expensive burdens imposed by that use as long as the Respondents choose Inland Center as a desirable place to communicate their message.

Such a significant State confiscation of Homart's property raises an important issue which warrants review by this Court.

B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, but Should Be, Settled by This Court

This Court has "vigorously and forthrightly rejected" the concept that those "who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[9] The Respondents have no constitutional right to require that Homart furnish them with a place to engage in their activities.

The desire to use private shopping center property for *unrelated* competing activities is one which, as here, occurs with almost daily frequency and variety. This is a situation far different from that arising from the use of such property for related activities. In today's prevailing social climate there is an expanding desire to propagandize an infinite variety of political, social, religious, commercial, charitable and economic ideas. Evidence of this phenomena can be found, for example, in the recent litigation involving the exercise of various First Amendment activities at locations other than shopping centers.[10] The attractiveness of private shopping centers, regardless of their shape or

9. *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966), citing *Cox* v. *Louisiana*, 379 U. S. 536, 559 (1965). See also *Younger* v. *Harris*, ... U. S. ...., 39 U. S. L. W. 4201, 4205 (Feb. 23, 1971); *Cameron* v. *Johnson*, 390 U. S. 611 (1968); *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1965); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); and *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942).

10. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, No. 1484, O. T. 1969; *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *Jones* v. *Regents of the University of Arizona*, ... F. 2d .... (9th Cir. Dec. 21, 1970); *Sellers* v. *Regents of the University of California*, 432 F. 2d 493 (9th Cir. 1970); *Women Strike for Peace* v. *Hickel*, 420 F. 2d 597 (D. C. Cir. 1969); *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (8th Cir 1969); *Powe* v. *Miles*, 407 F. 2d 73 (2nd Cir. 1968); *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (2nd Cir. 1968); and *Burnside* v. *Byars*, 363 F. 2d 744 (5th Cir. 1966).

size, as a place of communication, both peaceful and otherwise, is apparent.[11] If Inland Center must be made available to Respondents for their desired use, others will obviously have the same right to appropriate such property either to disagree with Respondents or for a wide spectrum of other personal reasons.

The instant case presents a far different question from that involved in *Logan Valley* and *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970).[12] The objective of the use sought here was not to protest or criticize any of the owners or tenants of Inland Center but rather to solicit signatures on a totally unrelated petition; the primary location chosen by Respondents was not the exterior sidewalk surrounding the Center mall but rather the common mall aisleways which are an integral part of and virtually indistinguishable from the actual selling areas; and, finally, here there was no resultant limitation on the effective expression of Respondents' message but rather an availability of a wide variety of alternative forums for reaching the desired audience. The present case thus raises directly the question, specifically left undecided in *Logan Valley*, of whether a shopping center owner's "property rights, could, consistently with the First Amendment justify a bar on [communication] . . .

11. See, *e.g.*, Weiss, *Shopping Center Malls; The Next Place for Teen-Age Riots*, Advertising Age, April 14, 1969, p. 106, and King, *Supermarkets Hub of Suburbs*, N. Y. Times, Feb. 7, 1971, § 1 at p. 58, cols. 4-6.

12. *Taggart* differed from *Logan Valley* in the physical nature of the situs (a small, congested single retail store as opposed to a large regional shopping center) rather than, as here, in a different objective of the communication desired and in an admitted availability of alternative forums. It was because of this related, but nevertheless separate, nature of the issues involved that Homart submitted a brief *amicus curiae* in *Taggart* so that "the Court should be aware of the pendency of the [instant] proceeding and not dispose of the different questions [here] involved." Motion and Brief of Homart Development Co. as *amicus curiae* in *Taggart* v. *Weinacker's*, No. 74, O. T. 1969, pp. 2, 6.

which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U. S. at 320, fn. 9.

The unresolved nature of the important and sensitive question here presented has resulted in considerable litigation throughout the nation. The same issue is now pending before at least one United States Court of Appeals and the highest court of three states.[13] Such controversy, unless alleviated by this Court, is surely likely to continue. The question presented is, as the American Civil Liberties Union stated in its *amicus* brief to the court below, "one of general interest and importance to all the public". The present case is an appropriate vehicle to resolve this important issue.[14]

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13. *Tanner* v. *Lloyd Corporation,* 308 F. Supp. 128 (D. Ore. 1970), *appeal pending,* No. 25605, 9th Cir.; *Homart Development Co.* v. *Fein, et al.,* R. I. Super. Ct. No. 75-275 (Aug. 6, 1970), *appeal pending,* No. 1174-A, R. I. Sup. Ct., reprinted at Appendix F; *People of the State of Ill.* v. *Sterling,* Ill. Cir. Ct. (March 19, 1970), *appeal pending,* No. 43499, Ill. Sup. Ct.; and *Sutherland, et al.* v. *Southcenter Shopping Center,* 3 Wash. App. Rep. 833 (No. 13) (1971), *appeal pending,* No. 41891, Wash. Sup. Ct. In *Tanner* and *Sutherland,* the lower courts decided that shopping centers could not bar the Vietnam War demonstrators and environmental petition solicitors, who, respectively, were there involved. An opposite conclusion was reached by the lower courts in *Homart* and *People* v. *Sterling* permitting the shopping centers in those cases to bar, respectively, political candidates and S.D.S. protestors. See also *State* v. *Miller,* 280 Minn. 566, 159 N. W. 2d 895 (1968), where the Minnesota Supreme Court, in a three line *per curiam* decision, reversed the trespass conviction of certain persons who had entered upon a shopping center to distribute political pamphlets holding, without explanation, that *Logan Valley* was dispositive.

14. The dispute involved here is a viable and continuing one. For example, on December 21, 1970, Respondents evidenced their desire to conduct a variety of activities at Inland Center "as soon as the remittitur issues . . ." Appendix E-1, pp. A52-53. Again, on January 7, 1971, their attorney declared his intent "to take advantage of [the California Supreme] Court's ruling" through the exercise of various "initiative petitions in the future, as well as . . . other kinds of activities." Appendix E-2, p. A55. See also Appendix B, pp. A7-A8; Appendix C, pp. A27-A29.

C. The Decision Below Resolves an Important Constitutional Question in a Manner Not in Accord with Applicable Decisions of This Court

The decision below presupposes that private shopping centers have become so impregnated with a public character that they must be treated as the equivalent of public property for *all* First Amendment purposes. It is founded upon the belief that, since the modern shopping center is the functional equivalent of a business district, it must be considered the exact counterpart of a public street or park. The cases upon which this novel and far-reaching constitutional concept is predicated, *Logan Valley* and *Marsh* v. *Alabama*, 326 U. S. 501 (1945), stand for no such proposition. Neither case requires that private property be equated with public property where there are effective alternative means of communication available.

In *Logan Valley*, a shopping center was precluded from barring a labor union from protesting the labor policies of a particular store located in the center. The rationale of the decision was that to uphold such a prohibition would immunize the shopping center and its tenants from "on-the-spot public criticism" and from "protected expression regarding their business." 391 U. S. at 324-5, 326. The crux of the decision was the absence of any other point of persuasion. Cf. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1965). Free expression and communication would have been defeated *altogether* if the use sought in that case had not been permitted. The decision in *Logan Valley* was, accordingly, one expressly limited to the related purpose there involved. 391 U. S. at 319-20.

Similarly, in *Marsh*, as Mr. Justice Black, the author of that opinion, makes clear in his dissenting opinion in *Logan Valley*, the private town there involved had taken

on *all* of the attributes of any American town. The property owner's total prohibition of expression, therefore, banned the exercise of First Amendment rights through *all* channels of communication. 391 U. S. at 332. However, the shopping center is functionally and authoritatively a far different entity from the company town. As one observer noted: "Noone spends his whole life within a shopping center as he well might do within a company town. People enter and leave a shopping center freely . . . the owners of a shopping center do not have the same power and influence over the lives and thoughts of its customers as the owners of a company town have over its inhabitants." Note, 49 Va. L. Rev. 1571, 1577 (1963).

The decision of the California Supreme Court in this case extends *Logan Valley* and *Marsh* into a considerably different arena where the interests involved are of a totally different order. It intrudes into an area where there is no basis for confiscating private property. A shopping center is not, as the court below presumes (Appendix B, pp. A9, A11), required by *Marsh* to be the precise equivalent of public property for *all* First Amendment purposes. And the crucial distinction between the use sought in *Logan Valley* and that desired in this case—the availability of alternative forums of expression—is one which not only makes the nature of the communication here "less compelling" (Appendix B, p. A16) but actually dictates a different result. The principal error of the court below is expressly the same as that of the District Court in *Tanner*. It is the presumption that a property owner "who opens his land to the general public . . . gives up the right to prohibit the distribution of literature . . .", or, for that matter, to prohibit any free speech activities whatsoever on his private commercial property. Appendix B, p. A12, quoting 308 F. Supp. at 132.

The decision below engages in a fundamental and dangerous misreading of *Marsh* and *Logan Valley*. This Court has never sanctioned the substantial deprivation of Homart's Fifth and Fourteenth Amendment now countenanced by the decision of the California Supreme Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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IN THE

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October Term, 1970

No. 1469

HOMART DEVELOPMENT CO,
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v.

ROGER JOHN DIAMOND,
PEOPLE'S LOBBY, INC.
WILLIAM DUXLER,
Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The captioned case is pending before the Court on a petition for a writ of certiorari to the California Supreme Court. The national importance of the question presented, and its need for resolution by the Court, has been underscored by a number of developments since the filing of the petition. Some of these developments were brought to the Court's attention in the Supplemental Brief of *Amicus* American Retail Federation.

Petitioner believes that the Court should also be aware that on May 4, 1971, the United States Court of Appeals for the 9th Circuit entered an order in *Tanner v. Lloyd Corp.*, Case No. 25605 (cited at p. 13 n 13 of the Petition), following oral argument therein, suspending submission of that case "pending the allowance or denial of the Petition for Certiorari in the U.S. Supreme Court in [the instant case], and thereafter, if the Petition is allowed, until *Diamond* is decided by the United States Supreme Court." Thus, there is a pressing need for resolution by this Court of the important question presented by this case.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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INTEREST OF THE AMICUS CURIAE.*

The American Retail Federation (hereinafter referred to as the "Federation"), is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

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* This brief is filed with the express written consent of counsel for both Petitioner and Respondents, in accordance with Rule 42(2) of the Court.

The Federation has appeared as *amicus curiae* before this Court in various matters of concern to its members and which have affected those members significantly in a wide variety of business relationships.[1] The instant case is decidedly within that category.

The interest of the Federation in urging reversal of the decision of the court below is predicated upon the substantial and damaging impact which that decision, if allowed to survive, will have on the retail industry.

While this case involves a shopping center, that fact does not properly delineate its effect on the industry. The term "shopping center" can be applied to any number and variety of merchandising and service operations. Indeed, there is no legally acceptable definition of the phrase "shopping center."[2]

Shopping centers can be of practically any size, ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores.[3] In fact, relatively smaller shopping centers pre-

1. For example, the Federation has recently filed briefs *amicus curiae* in *National Labor Relations Board* v. *United Insurance Company of America,* 390 U. S. 254 (1968); *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.,* 391 U. S. 308 (1968); *Sinclair Company* v. *N. L. R. B.,* 395 U. S. 575 (No. 585) (1969); *N. L. R. B.* v. *General Steel Products, Inc.,* 395 U. S. 575 (No. 573) (1969); *Sears, Roebuck & Co.* v. *Carpet Layers Local Union No. 419,* 397 U. S. 655 (1970); *Taggart* v. *Weinacker's,* 397 U. S. 223 (1970).

2. *Freeman* v. *Retail Clerks Union,* 45 LRRM 2334, 2337 (Super. Ct., 1959), *rev'd. on other grounds,* 58 Wash. 2d 426, 363 P. 2d 803 (1961).

3. Cf., e.g., the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N. Y. S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

dominate the field.[4] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they:

1) offer a variety of goods and services to the public,
2) are located on tracts of land with definite established boundaries, and
3) provide parking areas for their customers.

Significantly, these are characteristics also present in, and not materially different from, other types of retail enterprises or establishments which are not generally regarded as "shopping centers".

For example, there are many single unit department stores or discount houses which offer not only their own merchandise, but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise, while not generally considered to constitute a shopping center, "is essentially a shopping center by itself under one roof".[5] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[6] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the case of the sprawling suburban shopping centers, are constructed on a vertical plane due to space limitations such as those existing in downtown urban areas. Similarly situ-

4. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1969, pp. 28-29.

5. Id., at 31.

6. See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), *cert. den.*, 368 U. S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium size "shopping centers".

ated also are those multiple stores, businesses and offices located within a single building with a common entranceway, stairwell and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting one public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community and function as "shopping centers", and may thus be subject to the same demands as those which gave rise to the instant case.

The significance of this extended discussion of the nature of "shopping centers" is twofold. First, the task of defining a "shopping center" or of distinguishing such a commercial concept from similar or related business configurations which do not constitute shopping centers is, at best, highly complex, if feasible at all. Second, the enormous variety of those operations which have or may be described as "shopping centers",—whether that variety is viewed in terms of their location, size, function or manner of construction,—is such that a single rule relating to *all* "shopping centers" without further distinctions or qualifications would necessarily constitute an inappropriate basis for adjudicating individual disputes. An illustration of these difficulties was recently presented to this Court in *Taggart* v. *Weinacker's*, 397 U. S. 233. That case involved a single retail store containing a supermarket and a small drug department, all owned and operated by the same company. For the convenience of shoppers, the owner provided a small adjacent parking lot able to accommodate only two rows of automobiles. Adjoining the parking lot were public sidewalks. This store became involved in a labor dispute, resulting in picketing by a union in the parking lot and on the private walkway leading from the lot to the store. The union did not picket on the public sidewalks, although, given the nature of the premises, they

would have been equally visible there with equal access to the store's customers. The union sought to obtain review here of its state court trespass conviction, alleging its Constitutional right to engage in First Amendment activity on the premises of the "*shopping center*". (This Court granted the petition for writ of certiorari, but subsequently declined to reach the merits, concluding that the issue had become moot and the writ had been improvidently granted. The Court did *not*, however, vacate the lower court's decision.)

If the single store involved in *Taggart* may be said to constitute a "shopping center", a description which was applied to it even in this Court's decision, then the entire concept becomes meaningless; the mere fact of providing parking facilities for shoppers, however limited in size, would create a "shopping center". It is for this reason that the Federation believes that the ultimate disposition of the issue posed in this case should not be limited or addressed, without qualification, to a monolith denominated "shopping center". Our own proposed formulation of what he believe to constitute an appropriate rule of law (Part C, *infra*) is not so limited.

The interest of the Federation stems from the substantial and far-reaching consequences that any decision here may have for all methods of retail operation, not merely the traditional and more easily identified "shopping centers". The Federation is concerned that this Court, in formulating principles to resolve the instant controversy, should be aware of their ramifications on all of these various retail establishments as they may be affected by entry upon their property by any number of organizations or individuals desiring to propagandize an unlimited variety of messages.

The latter point is of particular concern to the Federa-

tion's members. For, apart from the difficulty of defining what a shopping center is, there is a substantial problem to retailers in coping with the number and variety of groups which would seek access to their private property in order to exercise asserted First Amendment rights. In an age of increasingly vocal dissent and social polarization, this represents a separate issue of importance to all retailers who may, given the view of the court below, be required to permit their property to become a battleground for opposing propagandists to the detriment of their own vital interests and those of the consumers who come upon their property in order to make purchases in attractive and peaceful surroundings.

Accordingly, the Federation supports the effort of petitioner, Homart Development Co., to achieve a resolution of the series of vexing and important problems presented by this case and to obtain the reversal of the decision of the lower court which fails to resolve those problems in a manner which accords adequate recognition and protection to the legitimate interests of all retailers.

REASONS FOR GRANTING THE WRIT.

This case presents for decision an unresolved conflict between rights guaranteed in the First, Fifth, and Fourteenth Amendments of the United States Constitution. The importance of obtaining a decision herein from this Court lies not only in the need to accommodate the substance of these conflicting Constitutional guarantees, but also because the problem posed in this case will continue to arise with increasing frequency in the future.

The conflict involved here occurs when groups seek to exercise First Amendment rights on the private property of another for purposes unrelated to the uses to which that property is put,[7] while the property owner seeks to limit that absolute exercise by his own reliance on the property rights which are created by state law and which are recognized and guaranteed in the Fifth and Fourteenth Amendments.[8]

This conflict cannot be resolved by a total subjugation of one set of rights to the other; such a solution would convert the existence of a Constitutional right to a merely qualified privilege. A balance must, therefore, be struck in which the essence of both guarantees may be preserved. The Court has not as yet sought to do so, having expressly reserved that duty in its *Logan Valley* decision. The court below, faced the described Constitutional conflict, declined to effect any such balance by its refusal to place any limits on the right of persons to engage in the peaceful exercise of First

7. Unlike the problem presented here, this Court has already addressed itself to the situation where the exercise of First Amendment rights are generally consonant with the ordinary use to which the private property is put. *Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308.

8. *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *People* v. *Goduto, supra*, fn. 6.

Amendment rights on the property of a privately owned shopping center.[9]

A. The Decision of the Court Below: A Refusal to Give Meaningful Effect to the Rights of Property in the Face of Competing First Amendment Claims.

The Court below framed the issue before it in terms of a negative absolute:

> "May the owners of a privately owned shopping center *deny all use* of their premises to persons who desire, on those premises, to engage in First Amendment activities unrelated to the business of the center?" (Emphasis added.) (A 4)

An implication of the issue, as framed, is that even if those owners may not deny *all* such use of their premises, they might Constitutionally deny *some* use. The nature of the court's discussion of this issue reveals, however, that in its view the matter is not susceptible to compromise or accommodation, for the essence of the parties' competing Constitutional interests is seen as an absolute conflict:

> "To be balanced against the interest of plaintiffs in the exercise of their First Amendment rights at the Center is the interest of defendants in *the complete prohibition* of non-business related activities." (Emphasis added.) (A 15)

It does not follow, however, that giving effect to a property owner's fundamental interest in the use and preservation of his property necessarily requires a *total* prohibi-

9. While the court did indicate that the First Amendment activity is subject to "reasonable regulation" as to the number of persons permitted and the length of time and locations at which they may be present, this regulation goes only to the *manner* in which the activity is conducted, and not to the *absolute right* of such persons to be present at some time at some locations. In finding the existence of this absolute right, the court failed to accord due regard to the property interests thereby adversely affected.

tion on others' unconsented First Amendment use of that property. The recognition and protection of the essential emoluments of property ownership can be achieved absent such unqualified control.[10]

However, when the court below took the view that the "right of property" was synonomous with such absolute control, then, when that right conflicted with an asserted First Amendment right, the court could not seek a balancing of those opposing rights but was left only with the duty to determine which was superior. That is, in the court's view, if the interests of property owners would not permit them to assert absolute dominion over their property so as to bar *all* unrelated First Amendment activity, as in one's home, then those interests were insufficient to effect a bar of *any* such activity.[11]

Pursuant to this view, challenged here as a matter of policy and precedent, the court below had only to determine whether the defendant shopping center could "deny *all* uses" of their premises to plaintiffs in order to resolve the instant conflict, rather than to seek a meaningful balancing or accommodation of opposing rights and interests.

Accordingly, the court interprets the relevant authorities to preclude a shopping center from imposing a "*blanket and total prohibition*" on the exercise of First Amendment rights on shopping center property (A. 8). Similarly, the court characterized *Marsh* v. *Alabama,* 326 U. S. 501,

10. A proposed rule of law which is derived from and harmonizes the outstanding authorities is set forth in part C, *infra.* The proposal recognizes the need for some relinquishment of such control without depriving property owners of the basic freedom to manage their property as they deem appropriate in furtherance of their legitimate business interests.

11. The court here refers to the owners' right to prevent others from coming onto their property to engage in First Amendment activity, not to the nature of the regulation of such activity once they are there.

to hold that a member of Jehovah's Witnesses could not be "*absolutely* prohibited" from engaging in First Amendment activity there, quoting in support this Court's observation that "Ownership does not always mean *absolute* dominion" (A. 8, 9). This Court's holding in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, was said to invalidate a shopping center's "*blanket prohibition* of picketing on its premises" (A. 10).

Thus, having concluded that no shopping center may prohibit *all* First Amendment activities on its premises,—which was the issue before the lower court,—the further conclusion followed that *no* such activity may be prohibited, subject to certain regulation, in view of the superior claim of the First Amendment and the insubstantial nature of shopping centers' competing property interests.

The Federation believes that this judgment, in a case of first impression, should be reviewed by this Court. There is a substantial need for clarification of the lower court's views (1) that a compromise of rights is inappropriate here given the nature of the conflicting interests; (2) that the cited precedents of this and other courts compel the conclusion that the inability to bar any First Amendment activity follows from the inability to prohibit all, and (3) that private shopping centers must, therefore, be treated, for these purposes, as if they were public property.

B. The Legitimate Interests of Privately-Owned Shopping Centers Give Rise to Rights Distinct from Those Attaching to Public Property.

The rationale for the lower court's decision that *no* peaceful First Amendment activities may be prohibited (as opposed to "regulated") on the premises of a privately-owned shopping center consists in the court's conclusion that such shopping centers are legally equivalent to public

streets, parks and "similar public places traditionally associated with the exercise of First Amendment rights" (A. 8). The court supports this conclusion by noting that "the public" is invited to these shopping centers which are said to function analogously to the "traditional town square" or "town center". By viewing the case in that light, the court below not only withheld from privately owned centers the enjoyment of those rights normally associated with private ownership, but went so far as to impose upon those owners the same duties with respect to the use of their private property as is borne by the State with respect to public property.

That result is a product of a series of dubious premises of such far-reaching impact as to compel this Court's attention.

Initially, a rule which describes "shopping centers" as analogous to "traditional" town squares or to town centers is guilty of over-reaching. No historical practice has or could be shown to support such an analogy. Indeed, the enormous diversity in size, shape and location of "shopping centers", noted *supra,* precludes referring to them or treating them as if they were all totally alike for any purpose. The social role of a huge shopping complex in a small town otherwise lacking a "town square" is entirely different, for example, from a complex of two or three small stores in the heart of a large city; yet both are "shopping centers" and, in the view of the court below, both become "public" "town centers".

Nor should the fact that shopping centers invite members of the public onto their premises convert those premises into the equivalent of public property. That invitation is not extended to all members of the public for all purposes. It is extended to consumers desiring to transact business with, and avail themselves of the services of, the enter-

prises assembled there. No such invitation is extended to those members of the "public" who would use the centers' premises for purposes of their own which were unintended by the owners, were unrelated to the owners' reason for creating the center, and which would actually or potentially interfere, to some extent, with the business object for which it was built. While this Court recognized, in *Marsh* v. *Alabama, supra,* that an owner who invites members of the public onto his property assumes the duty to honor the statutory and Constitutional rights of those whom he invites, that decision did not extend such a duty to all other persons for all purposes. Nor did that decision, or any other decision of this Court, hold that all private property to which members of the public are invited thereby lose their private character, becoming the functional equivalent of public streets or parks.

In holding that "shopping centers" may not prohibit any First Amendment activities which may not "absolutely" be barred on the public streets, the court below imposed upon the private owners of such centers the duty to permit and tolerate on their premises the expression of any views by any groups on any subjects which were not themselves unlawful or likely to result in personal or property damage. The effect of this duty is demonstrably great and, potentially, seriously adverse to the interests of the property owners.

> Even the court below understood this duty to apply
>
> ". . . without discrimination to *all* varieties of charitable, religious, paternal, social and political groups that seek to use the Center's property for *any* forms of solicitation or discussion." (Emphasis added.) (A. 5)

The combination of the enormous numbers of groups and causes described in this quoted language, together with the fact that the contemporary social climate gives rise to

ever-increasing forms and bases for protest and dissent, suggests the burden which the decision of the court below would place upon private shopping centers.

In holding that all such centers—whether large or small, urban or suburban, in cosmopolitan or parochial neighborhoods, isolated or in dense and competitive areas,—must function for First Amendment purposes as if they were public parks or streets, the court below concludes that those centers have no meaningful property interest in a *reasonable limitation* (as contrasted with a total prohibition or mere regulation) of strangers' right to engage in unrelated First Amendment activities on their premises. The Federation challenges that conclusion and believes it to be an issue of sufficient significance, philosophically and practically, to warrant this Court's attention.

In practical terms, it seems fair to assume that those who come to do business at a shopping center do not have unlimited time or patience; mothers of young children, for example, are limited by the periods the children are in school and by the time requirements of other chores. To the extent these consumers' time and attention are occupied by matters unrelated to the purpose of the center, or to the extent they choose to go elsewhere in order to avoid a possible confrontation of controversial or conflicting ideological positions, the center suffers some jeopardy. While it is true that the court below would prohibit such unrelated First Amendment activity as would result in "destruction of or *undue* interference with normal business operations" (A. 20), this concession to the property interests of the centers' owners does not reach the principal jeopardy which would result from the adoption of the lower court's holding. For that jeopardy does not consist primarily in the relatively fewer instances in which First Amendment activity would totally or virtually obstruct

business operations but in the lesser but regular and continual interference which would necessarily result from the presence on center property of every group seeking to propagandize any cause in the name of First Amendment rights.

The belief of the court below that the absolute right of such groups to some access to private center property would result in no damage to private interests and does not raise any "meaningful claim" to the protection of those jeopardized interests, appears to the Federation to be unwarranted and unrealistic. Moreover, the lower court's assertion that any threatened jeopardy may be alleviated through the regulation (as opposed to some prohibition) of the activities of the countless groups which will seek access to shopping centers is similarly unwarranted. No "regulation" will go so far as to render ineffective the regulated groups' object to inform, convert, solicit or propagandize. Therefore, whatever limit may be imposed upon the number of persons permitted to engage in these activities, or the hours and places in which they will be permitted to do so, the end result will be that sufficient persons will remain at sufficient times and at sufficient locations effectively to divert the attention of shoppers or to consume their available time or to annoy them or inflame their antagonisms or to induce them to trade in other less volatile or more peaceful surroundings. Accordingly, "regulation" may prevent total disruption of a center's business but will not eliminate lesser damage which, continued over a period of time, may be both quite substantial and, given the availability of effective alternative public forums, wholly unnecessary.

A fair balancing between private landowners' vital and legitimate property interests and the competing guarantees to others contained in the First Amendment requires a level of analysis beyond the specious conclusion that all shopping centers are like town squares, town centers, public streets

and parks and constitute public property without a need for special provision to be made for the specific private business purpose for which such centers were created.

C. A Proposal for Harmonizing the Authorities and Fairly Accommodating the Competing Constitutional Claims.

Courts' analysis of the impact of the First Amendment upon the right of private landowners reasonably to restrict the use of their premises has suffered from two infirmities. First, cases have been decided either on the basis of "rules" or "tests" which were only descriptions of results reached in particular factual contexts or on the basis of fictional assumptions which were elevated to the status of rules of law. And second, courts have tended, as did the court below, to ignore this Court's direction in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, to reach an accommodation with as little destruction of one competing right as is consistent with the maintenance of the other.

The Federation believes that a fair and reasonable analysis of the principal decided authorities concerning the instant issue, in the light of the direction of *Babcock & Wilcox*, yields a rule of law fairly balancing the competing interests without reliance on descriptive rules and legal fictions:

> Owners of private establishments catering to the public may deny the use of their premises to those who wish to use those premises for First Amendment activities unrelated to the purpose for which the public is invited *except* when no reasonably effective alternative means of communication is available.

This rule achieves a fair balance between the opposing Constitutional grants. Those wishing to exercise First Amendment rights are *guaranteed* the right effectively to do so, including, as a last resort, the *right* to use others'

private property; those who own property may limit the propaganda use to which strangers may put that property, except when no other reasonably effective means is available for the expression of legally permissible views.

In practice, courts have followed this rule irrespective of the rhetoric they have employed. Thus, in *Marsh* v. *Alabama,* the use of private property was permitted since, all the town's property being private, *no* alternative was available for the effective expression of propaganda to the town's residents. In *Logan Valley* the union's publicity, having been directed to prospective customers of a specific store, could not reasonably effectively have been made other than at the store's location at a time when those customers could receive and be influenced by the union's message. Similarly, in both *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (CA 2, 1968), and *In re Hoffman,* 64 Cal. 2d 845 (1967), the rights granted anti-war groups to picket the premises involved in those cases are consistent with the judgment that the object of the demonstrations,—*i.e.,* to reach and influence Vietnam-bound servicemen,—could be effectively achieved only at the time and place where those servicemen were assembled.

In accord with these decisions granting the right to propagandize on private property, those other courts which have refused to permit such conduct have done so in factual contexts in which there existed reasonably effective alternative means to the use of such private property. Thus, for example, in *Babcock & Wilcox Co.,* this Court emphasized both the existence of such reasonable alternatives and the consequent absence of necessity to use private property in order to achieve effective communication of the views sought to be expressed. And the application of this proposed rule to *Taggart* v. *Weinacker's, supra,* similarly justifies the state court's decision there, undisturbed by this Court, finding the union's picketing of private retail

property to constitute a trespass rather than protected First Amendment activity; for in *Taggart* the union's use of private property was unnecessary since the availability of the adjoining *public* sidewalks gave the union a wholly effective alternative locus from which to reach the very persons with whom it sought to communicate from the private parking lot.

The fact that the rule proposed here explains and harmonizes the results reached in each of these cases while striking a reasonable balance between the conflicting Constitutional guarantees involved argues strongly for its express adoption by this Court in the instant case. A secondary benefit which would be derived from doing so consists in the fact that courts would then become free to decide cases without a forced reliance on legal fiction or on essentially post hoc rules.

When this Court in *Logan Valley* described shopping centers as "functional equivalents" of municipal property, its analogy referred only to the *private municipal* property involved in *Marsh* and was, therefore, saying only that in appropriate circumstances private property could be treated as if it were public. The Court made no fixed determination as to what those circumstances would be. What is clear, as was noted before, is that this Court did *not* conclude that whenever any private property is open to the public, it automatically and totally loses its character as "private" and becomes "public" for all purposes. In sum, reference to "functional equivalence" does not constitute an analytical tool for determining when private property is subject to public First Amendment use, but merely describes the conclusion, otherwise arrived at, that under particular factual circumstances it may be so used.

Similarly, the fact that the views sought to be expressed are "generally consonant" with the use to which the private

property is put should not give rise to a rule legitimizing the public use of private property. Nor should such public use be barred, without further inquiry, because there exists no such general consonance. Let it be assumed, as a variation of the facts in *Wolin*, that servicemen bound for Vietnam were assembled as a group only in a private restaurant located in a shopping center, but that their times of departure were so staggered that *nowhere else* would they appear as a group. Would it not be reasonable to permit an anti-war demonstration directed to them to be conducted on center property near the restaurant's premises, irrespective of the fact that the uses to which the center and restaurant are put are unrelated to the purpose of the demonstration, simply because no other site and time affords an effective means of communication with those servicemen? Conversely, would it not also be reasonable to bar such demonstrations on private property, even though the use of that property is directly related to the purpose of the demonstration, when it appears that there do exist reasonably effective alternative means to achieve the same communication without invading private property?

The special emphasis which has been placed upon the "general consonance" of the First Amendment purpose and the private property's use appears to be predicated upon the assumption that where such a relationship exists, the private premises constitute the only means for effective publicity. To the extent that assumption is supported by the facts in any given case, then the public use of private property seems justified. However, instead of raising an assumption to the status of a Constitutional rule, the decision-making process should focus directly on the principle which underlies that assumption,—that First Amendment rights may impinge on property rights only when, in fact, no reasonably effective alternative means of communication are available.

Apart from achieving a fair balance of competing rights without destroying either, the proposed rule yields additional benefits. The holding of the court below allows every group or cause which would be permitted in a public park to come upon private shopping center premises, subject to reasonable regulation. Given the virtually unlimited number of such groups and causes and the potentially divisive and inflammatory effect many would have on their consumer audience, the problem of "regulation" becomes a very serious one.[12] While the proposed rule would not avoid that problem altogether, the mere fact that it would limit the number of such incursions to those instances where no reasonably effective alternatives exist would render that problem more manageable and susceptible of a more relaxed and thoughtful disposition whenever it did arise.

Nor would courts become flooded with suits seeking a determination of the validity of the multitude of varying regulations which the various "shopping centers" would otherwise continually be required to improvise.[13]

Should the rule proposed here be adopted, its application to the instant case would appear to require a reversal of the decision of the California Supreme Court. Respondents' appeal was not uniquely or solely directed at those

12. In addition to judgmental decisions seeking the least disruption of center business consistent with effective First Amendment use, "regulation" also involves maintenance and policing costs which must be borne by those whose businesses are, to some extent, being disrupted. There is also the matter of liability for injury both to consumers and to those seeking to exercise First Amendment rights, and added insurance costs, among other problems and costs related to or involved in such "regulation".

13. Assuming in the instant case, for example, that plaintiffs would be deemed entitled to make their desired use of Inland Center property, a question would arise as to whether they may be restricted to the parking lots or the entrances to the shopping area itself in order to minimize business disruption, or whether they have a right to congregate within the enclosed aisleways from which the Center's stores flow without physical barrier, as the Respondents continue to believe they may do.

consumers doing business at the shopping center. There were numerous alternative avenues available for effective communication with those persons whom Respondents desired to reach. These included all the mass media; public streets and parks; the public property adjoining every large assemblage of persons attending, for example, concerts and sporting events; and direct mailing to the homes of prospective voters, among other choices.

Therefore, to restrict Respondents to the use of these available and effective alternatives would neither deprive them of the benefits guaranteed in the First Amendment nor deprive Petitioner of the recognition and protection of his legitimate, and similarly guaranteed, property rights.

CONCLUSION.

For the reasons stated herein, the Court is respectfully urged to grant the instant Petition for Writ of Certiorari and, on consideration of the merits of the case, to adopt the proposed rule of law as a Constitutionally sound accommodation of competing rights and interests.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1469

HOMART DEVELOPMENT CO.,

Petitioner,

vs.

ROGER JON DIAMOND,
PEOPLE'S LOBBY, INC.,
and WILLIAM DUXLER,

Respondents.

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE
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Respondents agree with Petitioner that a writ of certiorari should issue to review the opinion of the Supreme Court of California filed on December 16, 1970. Respondents contend that the decision, with one exception, is correct, and that, in any event, the decision should be of national effect. The one exception is the California Supreme Court's implication that

Homart may impose prior restraints on the exercise of First Amendment rights by the unilateral adoption of regulations.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. May the owners of a privately owned shopping center which functions as a central business district deny all use of the premises to persons who desire, on those premises, to engage in peaceful and orderly First Amendment activities unrelated to the business of the center?

2. If persons may exercise First Amendment rights on such premises, may the owners nevertheless restrict, limit, and impede the exercise of such rights by the imposition of their previously and unilaterally promulgated regulations?

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW SHOULD BE THE LAW OF THE LAND.

Free speech is one of the "preferred rights" in our Constitution. It is a hollow right if there is no way of exercising it. Traditionally, free speech has been exercised in the town square and central business district, where persons congregated in large numbers. Today, the modern shopping center has replaced, to a large extent, the typical town square and central business district, and has become their functional equivalent. The shopping center attracts thousands of persons a day from surrounding residential areas. These persons, whose historical counterparts used to travel to central downtown business districts to partake in commercial and cultural activities, thereby subjecting themselves to communication from others exercising First Amendment rights, now can only be reached at the shopping center. It has therefore become necessary for persons desiring to communicate their message to the public to have access to the shopping center. This is especially the case with respect to certain kinds of First Amendment activities, such as the solicitation of signatures of registered voters on initiative petitions, which can only be effectuated through face to face conduct.

Respondents sought access to Petitioner's shopping center for the purpose of collecting signatures on their anti-pollution initiative petitions, in order to qualify the petitions for the state election. Although Respondents were denied access by Petitioner and by the lower California courts, the California Supreme Court held that Respondents have a right to collect signatures on their anti-pollution initiative petitions and disseminate information in connection therewith, on the premises of the shopping center.

Respondents are now interested in carrying on their anti-pollution campaign in other states, as well as encouraging other citizens to do likewise. Rather than litigating the same issue in numerous other jurisdictions, it would be sounder policy for the citizens of all states to have a similar First Amendment right now confirmed by this Court. The need for immediate confirmation is evident in Illinois and Rhode Island, where trial courts have denied citizens of those states their First Amendment rights. See Homart Development Co. v. Fein, et al., R.I. Sup. Ct. No. 75-275 (August 6, 1970), appeal pending, No. 1174-A, R.I. Sup. Ct., reprinted at Appendix F to the Petition for Writ of Certiorari; People of the State of Illinois v. Sterling, Ill. Cir. Ct., (March 19, 1970), appeal pending, No. 43499, Ill. Sup. Ct.

In conclusion, as the American Civil Liberties Union of Southern California advised the court below, ". . . The issue is one of

general interest and importance to all the public . . . ," and therefore, ought to be resolved by this Court.

B. THE DECISION BELOW, IN SO FAR AS IT AUTHORIZES SHOPPING CENTERS TO PROMULGATE THEIR OWN REGULATIONS TO RESTRAIN RESPONDENTS' FIRST AMENDMENT RIGHTS, VIOLATES THOSE RIGHTS.

The California Supreme Court stated,

> "We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights be exercised, if at all, through reasonable regulations calculated to protect their business interests rather than through absolute bans on all non-business related activities. Shopping centers, like railway stations, are not incapable of regulating permissible activities." Appendix B, p. 19.

Respondents concede that their First Amendment activities on the premises of shopping centers are subject to reasonable regulation. For example, they must be peaceful, orderly,

and not obstruct or interfere with the business of the center. However, Respondents contend that the state or municipality involved rather than a private, self-interested property owner, should adopt the rules and regulations in order to permit citizen participation in the promulgation of such rules and regulations. Indeed, various laws and ordinances dealing with disturbing the peace, loitering, lewd conduct, and loud noises, and others of a similar nature, which exist in most communities in the nation, already constitute a major portion of the rules and regulations governing the conduct of persons on and off shopping center premises. If additional laws are needed, they can be adopted by the appropriate public bodies.

If a shopping center owner believes that certain conduct is obstructive or unduly interferes with the business of the center, he is free to sue for injunctive relief and seek to include in the decree any regulations which he has adopted. In this way, the burden of litigation would be on the shopping center. Otherwise, the citizens will have to initiate litigation to determine the reasonableness of regulations for every shopping center to which they seek access. This burden would have a "chilling effect" on the citizens' First Amendment rights. Furthermore, this burden would be especially great on those persons, such as Respondents, who seek to disseminate their message throughout a state, or the country.

This Court should grant certiorari to consider the issue of "reasonable regulations" set forth in the QUESTIONS PRESENTED. This issue was not definitely resolved by this Court in Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968):

> "And it may well be that Respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." 391 U.S. at 319 (emphasis added).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Ceriorari should be granted.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

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IN THE

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OCTOBER TERM, 1970.

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BRIEF FOR THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

INTEREST OF AMICUS.

The International Council of Shopping Centers, Inc. is a not-for-profit corporation. Its membership of 3600 consists of entities and individuals involved in construction, acquisition, leasing and management of shopping centers. There are approximately 13,000 shopping centers in operation in North America. They account for approximately 44% of all retail sales, exclusive of the sale of automobile and building materials. It is the only trade association representing the shopping center industry in the United States.

The Council's interest is obvious from the nature of the far-reaching majority decision of the Court below. In essence it held that the First Amendment rights of those seeking signatures on an initiative petition were superior to the right of the shopping center owner to determine and limit the uses to which its property might be put. Since the petitions had as their object the enactment of anti-pollution legislation (A. 4), and no activity of the shopping center owners was being either criticized or commented on, the decision below raises the precise question which this Court left open in *Amalgamated Food Employees* v. *Logan Valley Plaza* (391 U. S. 308, 320, fnt. 9). There this Court stated:

> "The picketing carried on by petitioners was directed specifically as patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."

The decision of the court below throws shopping center property open to all who wish to use it as a convenient forum and results in expropriation of private property, the access to which has heretofore been limited to those in either actual or potential business relations with the owner or tenants of the shopping center. The matter is of vital importance to shopping center owners and tenants as their income is dependent upon the ease of customer access to, and movement about in, the shopping center.

The written consents of counsel for petitioner and respondent have been filed with the Clerk of this Court.

ARGUMENT.

The considerations compelling granting of the writ are cogently set forth in the petition. We shall simply set forth a few practical observations:

Shopping centers are a response to the needs and demands of customers, the principal two of which are: (1) their need and desire for adequate parking space immediately adjacent to where they intend to make their purchases; and (2) the desire of the consumer for one-stop shopping.

The gross sales of a shopping center are so dependent upon available parking space, and land for parking is so expensive, that this *amicus* has subsidized studies by the Urban Land Institute which have concluded, that there is an optimum ratio of parking spaces to the gross leasable area of the shopping center. (Aronov, Aaron in Chain Store Age Sp. Ed. E. 41, May, 1967.) *A fortiori,* unimpeded pedestrian movement in and about the malls and shopping areas is even more important to the economic success of the center. The shopping center also bears the heavy costs of taxation and maintenance of the parking lot, malls and other common areas. It follows therefore that, as a matter of economic self-defense, shopping center owners and tenants typically prohibit non-business use of their facilities and mutually covenant that the malls and other common areas will be used solely for the purposes for which designed.

The steps which shopping center owners take to limit the use of their property to customers vary, but among the more common are: posting signs informing the public that the shopping center is private property "for use by customers only"; placing chains across entrances during non-

business hours; towing away cars parked there by non-customers; restricting employee parking to designated areas; prohibiting the placing of advertising material on cars parked in the center; and otherwise policing the area.

Viewed broadly, it is obvious that respondents' position is at bottom an attack on the fundamental right of an owner to determine and control the use to which his property is to be put and to exclude other persons from it where they endeavor to use it for purposes that conflict with the intended use. These rights, to determine use and to prevent other uses, are essential attributes of the value of property to the owner. Moreover, the argument that the right of free speech carries with it the right of access to the speaker's most favored forum, and that those rights are superior to the rights of ownership, is a limitless doctrine leading to the grossest of absurdities. At the risk of belaboring the obvious, we suggest that the right of free speech does not justify intrusion into the quiet of the reading room of a public library, nor does it afford the Lutheran a right to "demand equal time" in a Catholic church. *A fortiori*, in the private sector no rule of law or reason requires a shopping center owner to permit his tenants' stores, the malls, the parking lots and sidewalks to become a cockpit for contending factions, assorted demonstrators, or business competitors. Any such result would clearly run afoul of the Fifth Amendment and amount to nothing more than the expropriation of private property for what respondents' conceive to be public purposes. If the need for unlimited access to shopping centers be so vital to the public as respondents contend, we suggest that the constitutional method of satisfying that (we say non-existent) need would be condemnation of portions of the centers by the appropriate state authority with fair compensation to the owner, removal of the property from the tax rolls, and assumption by the public of the burdens of

maintaining it and providing police protection. If the public interest in the matter be as substantial as respondent contends, the public is not without tools to protect it in a constitutional fashion.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 9, 1971.

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IN THE

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OCTOBER TERM, 1970

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California

SUPPLEMENTAL BRIEF OF AMICUS CURIAE, AMERICAN RETAIL FEDERATION

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California

---

SUPPLEMENTAL BRIEF OF AMICUS CURIAE. AMERICAN RETAIL FEDERATION

Following the submission of our brief *amicus curiae* herein, we have become aware of two developments which relate to and give substance to the fear expressed in our prior brief that the decision below, if it is not amended by this Court, will give rise to dangerous extensions of the rule evolved there to situations

and circumstances in which it is inappropriate and undesirable.[1]

First, on March 24, 1971, a decision issued from the United States Court of Appeals for the Eighth Circuit which extends this Court's decision relating to "shopping centers" in *Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), to any single, free-standing commercial enterprise which provides parking facilities for its employees and customers. *Central Hardware Company* v. *N.L.R.B., et al.,* 76 LRRM 2873. In reaching that result, the Eighth Circuit relied on the same authorities and principles as did the court below in this case, and concluded that any store which provides parking facilities and which does business with the public functions as if it were a shopping center or a company-owned town; *i.e.,* it becomes "quasi-public" property with respect to strangers' right to engage in any unrelated First Amendment use of that property. Moreover, the difficulty which the Eighth Circuit experienced in reconciling the differing requirements of *Logan Valley* and *N.L.R.B.* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956),—and which led to a dissent there which incorporates the views of the Federation,—also afflicts the decision of the court below.[2]

Thus, the importance of obtaining a resolution from this Court of the validity of the principles and rationale adopted by the court below as applied to shopping

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[1] This Supplemental Statement is filed pursuant to Rule 24(5) of this Court.

[2] Central Hardware Company filed a petition for rehearing *en banc* and a petition for rehearing which were denied by the Eighth Circuit by orders entered by an equally divided court on April 26, 1971.

centers is magnified by their extension in *Central Hardware* to individual stores.

Second, it appears that the decision of the court below in this case has been understood by the Respondents herein similarly to apply to an individual store not connected with any "shopping center." Attached hereto is an affidavit of a manager of a Sears, Roebuck and Co. retail facility,[3] which is not part of any shopping center complex, and at which these Respondents demanded the right to engage in First Amendment activities unrelated to the purpose for which the facility was built or is used. According to this affidavit, the legal predicate for the right asserted consisted in the decision of the court below.

It is respectfully submitted that these developments, which constitute just such an extension of the rationale of the lower court's holding as its continuing viability invites, emphasizes the need for clarification by this Court of the limits of the competing Constitutional claims.

Of Counsel:

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---

[3] Sears, Roebuck & Co. is a member of the American Retail Federation.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,199

CENTRAL HARDWARE COMPANY, *Petitioner*,

v.

* NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *Intervenor*.

[March 24, 1971.]

Before GIBSON and BRIGHT, Circuit Judges, and MCMANUS, Chief District Judge.

PER CURIAM.

The petitioner, Central Hardware Company, seeks review of the National Labor Relations Board's order (reported at 181 N.L.R.B. No. 74) and the Board files a cross-application for enforcement of the order requiring petitioner to cease and desist from unfair labor practices found to be violative of §§ 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § 158) and affirmatively requiring the petitioner to revoke and withdraw its no-solicitation rule and to reimburse employee Ragle for a three-day loss of earnings.

The actions found to be violative of §§ 8(a)(1) and (3) of the Act occurred during an organizational campaign by representatives of the Retail Clerks Union, Local 725, Retail Clerks International Association, AFL-CIO, intervenor, at petitioner's two stores in the Indianapolis,

* 25-CA-3214, Moore/Roth.

Indiana area in 1968.[1] The petitioner (hereafter called Company) opened two retail stores on the outskirts of Indianapolis, Indiana, in the spring of 1968. The stores were designated as the East Store and the West Store. Hiring was commenced about April 15, 1968, culminating with a work force of some 125 employees for each store at the time of the openings on June 3, 1968. The Board found the Union began an organizational drive a week or so before the stores opened, but the record shows that the Company hired Edward Stahl, Jr., in April 1968 as an employee, not knowing that Stahl was an undercover agent for the Union and was paid to work full time for the Union in organizing the Company's Indianapolis stores. Stahl received full time salary both from the Union and from the Company and utilized his position to talk to the employees and solicit them to join the Union. He was instrumental in supplying a list of the employees, 80 per cent complete, to the union organizers.

Some 9 or 10 union organizers from both outside and within the Indianapolis area conducted a blitz type campaign seeking signed authorization cards to establish the Union and the bargaining agent for the employees of both stores. During the first month of the campaign, commencing May 21, 1968, the Union received 92 signed authorization cards, but during the next three weeks of the campaign the Union only received 17 signed authorization cards. The decrease in the number of signed authorization cards was apparently due to the removal by the Union of most of its outside organizers and a decrease in activity of Indianapolis organizers who had other regular

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[1] The petitioner, Central Hardware Company, operated 10 retail hardware stores, 8 in the St. Louis, Missouri area and 2 in the Indianapolis, Indiana area. The petitioner is a Missouri corporation with its principal place of business in St. Louis, Missouri; thus jurisdiction is properly lodged in the Eighth Circuit (along with other circuits or districts) under §§ 10(c) and (f) of the National Labor Relations Act, as amended.

union functions to perform in connection with other employers.

The organizational campaign took place primarily on the Company's parking lots. The Company had a no-solicitation rule which it enforced against all solicitational operations in the stores and in the parking lots. A number of employees protested to the Company concerning the union organizational activity on the parking lots, complaining that they were detained in leaving the lot and were threatened; they sought protection when leaving the store at night. This complaint was, at the suggestion of management, placed in written form signed by 97 out of 125 employees at one of the stores and was directed to an executive official at St. Louis, Missouri. The signed complaint stated in effect that the undersigned employees did not want to be harassed any more by the Union and they did not wish to join this Union.

The Company accepted and expressed gratification for the complaint and instructed the Indianapolis management to keep all union organizers off the Company's premises, including the parking lots. After most of the Union's organizers had either left town or left the Company's premises, Mark Kapetanakis, a field organizer for the Union from Columbus, Ohio, and Stahl, the sub rosa union organizer, who had subsequently been discharged for cause, met on the lot of the West Store and started into the store. The store manager met them in the parking lot and told them he did not want them in the store or on the parking lot. Kapetanakis replied that he was going into the store as a customer and would not be talking to the employees about the Union. The manager again told Kapetanakis not to go into the store and if he did the police would be called. Stahl left but Kapetanakis went into the store. The police were called, talked to Kapetanakis and insisted that he leave the store. Upon refusal to leave he was placed under arrest, escorted to a police car and taken to the police station.

Shortly after the Company received the written complaint from the employee, it filed a charge of unfair labor practices against the Union. The Union in turn filed unfair labor practices against the Company on August 21, 1968, and on October 16, 1968. A combined complaint was filed by the General Counsel against the Company, the hearing of which was concluded on February 6, 1969. The Board found that the Company's employee no-solicitation rule was unlawfully broad and was discriminatorily applied, thus violating § 8(a)(1) of the Act; that interrogation of employees concerning a violation of the no-solicitation rule and the subsequent suspending of employee Ragle for violating that rule was violative of §§ 8(a)(1) and (3) of the Act; that the absence of a reasonable opportunity for the Union to otherwise reach employees and the quasi-public nature of the Company's parking lots, coupled with the allegedly unlawful non-employee no-solicitation rule, violated § 8(a)(1) of the Act; and that the Company's interrogation of employee Ragle concerning her union sympathies and a speech by vice president Reed exceeded the permissible bounds of free speech, violating § 8(a)(1) of the Act.

NO-SOLICITATION RULE

A. Employees.

The Board found that the Company's employee no-solicitation rule was overly broad and was also discriminatorily applied in that the Company allowed anti-union solicitation while taking a strict stand against all other types of solicitation. Employee Ragle was suspended for three days for violation of the Company's employee no-solicitation rule. The Company's rule on employees' solicitation was quite broad and prohibited solicitations on the Company's premises without limitation as to time or place, in the absence of Company approval. It is evident that such a broad employee no-solicitation rule is invalid as constituting an interference with the employees' rights

to concerted action. As a matter of congressional policy, employees under § 7 of the Act (29 U.S.C. § 157) have the right to organize and engage in concerted action for purposes of mutual protection and collective bargaining: and employees by an amendment of the Act in 1947 also have the right to refrain from such activity. Under § 8(a)(1) of the Act (29 U.S.C. § 158), an employer must respect an employee's § 7 rights and may not interfere, restrain or act coercively with respect to these rights.

The Supreme Court in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945) upheld the Board's authority to view overly broad employee no-solicitation rules as interfering with the employees' § 7 rights and thus constituting unfair labor practices under § 8(a)(1). Both the Board and the Court, in balancing the respective rights of management to conduct its own affairs and the employees to freely organize, recognized that the employer may make and enforce reasonable rules governing the conduct of employees on company time. Absent discriminatory factors, this would include prohibiting union solicitation by employees during working hours; but an employee's time outside working hours, even though on the company's premises, as during the luncheon hour, rest periods or after work, were his to use as he wishes, and the employees' activities during the non-working periods may not be unreasonably restrained. *Republic Aviation Corp.* v. *NLRB, supra,* at 803. Therefore, any rule prohibiting employee union solicitation outside of working hours is viewed as an unreasonable impediment to self-organization and discriminatory, absent evidence that such a rule is necessary in order to maintain production or discipline.

An employer in the retail business may in addition prohibit employee solicitation in selling areas during non-working time as such solicitation could prove disruptive of the selling operation. However, the prohibition may not extend to the non-selling areas of the company's

premises. *NLRB* v. *May Department Stores,* 154 F.2d 533, 537 (8th Cir.), *cert. denied,* 329 U.S. 725 (1946).

Also, even a valid no-solicitation rule, properly circumscribed as set forth above, may be violative of § 8(a)(1) if the rule is enforced in a disparate or discriminatory manner. *NLRB* v. *Electro Plastics Fabrics, Inc.,* 381 F.2d 374 (4th Cir. 1967); *Revere Camera* v. *NLRB,* 304 F.2d 162 (7th Cir. 1962); *NLRB* v. *May Department Stores,* 154 F.2d 533, 537 (8th Cir. 1946). It is thus clear that an employer violates § 8(a)(1) of the Act by a broad employee no-solicitation rule which prohibits union solicitation on all company property even during non-working periods and in non-working areas. *Republic Aviation, supra; Jas. E. Matthews* v. *NLRB,* 354 F.2d 432 (8th Cir.), *cert. denied,* 384 U.S. 1002 (1966).

The overly broad no-solicitation rule of the Company (characterized as being a matter of company policy even before it was communicated to the employees of the East and West Stores) was violative of § 8(a)(1) of the Act. Although the Company had a right to prohibit employee solicitation on company time, the overbreadth of the rule constituted interference with the employees' § 7 rights of organization. With respect to employee Ragle, the Company never made clear to her what her rights were in respect to employee solicitation, and it appears that the Board's finding of a §§ 8(a)(1) and (3) violation for her three-day suspension is supported by substantial evidence on the record.

B. Non-Employees.

We next consider the Company's no-solicitation rule barring non-employee union organizers from contacting Company employees on Central Hardware's business premises, including its parking lots. Each of the Company's stores has a parking lot located in front of and along one side of the store. The store employees park in specified

areas of the lots, which accommodate about 350 cars. Other smaller businesses located nearby provide their customers with separate parking facilities. Only Central Hardware's employees and customers use the parking facilities provided at each of their two stores.

The Board made no specific finding concerning oppressive solicitation tactics practiced by union organizers in these parking lots. It did, however, specifically find that petitioner Central Hardware had made its lots accessible to the public without limitation. Applying principals enunciated in *Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), and *Solo Cup Company,* 172 N.L.R.B. No. 110 (1968), the Board declared the Company's non-employee no-solicitation rule overly broad and found its enforcement in the instant case to be violative of § 8(a)(1).

The Company contends that restricting the use of the lots for customer and employee parking preserved the "private property" characteristics of this parking area. It argues that the area did not become available for general use by the public or for special use by union organizers. The Company alleges that since the Union failed to show that the employees were beyond the reach of reasonable union efforts to communicate with them, the record furnishes no basis for a § 8(a)(1) violation in enforcement of this non-employee no-solicitation rule. On this petition for review, the Company relies upon *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956), and the fact that the Board's determination in *Solo Cup, supra,* was subsequently reversed in *NLRB* v. *Solo Cup Company,* 422 F.2d 1149 (7th Cir. 1970). We briefly examine the background and circumstances of those cases. In *Babcock & Wilcox, supra,* the Court determined that an employer's refusal to permit distribution of union literature by non-employee union organizers on the company-owned parking lots did not constitute a § 8(a)(1) violation. There, the parking lots adjoined the fenced-in plant areas. In *Bab-*

cock & Wilcox, the Court emphasized the fact that other channels of communication were available to the union organizers which would enable them to get their message to the employees. Mr. Justice Reed, speaking for the Court, observed:

> . . . [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. . . .
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> * * *
>
> . . . The right of self-organization depends in some measure on the ability of the employees to learn the advantages of self-organization from others. Consequently, if the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.
>
> . . . Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. [351 U.S. at 112-114]

In *NLRB* v. *Solo Cup Company, supra,* the Seventh Circuit followed the rationale of *Babcock & Wilcox* and rejected the Board's determination that an industrial park containing plants of eight companies, including Solo Cup, constituted a quasi-public area open to the public as well

as to union organizers seeking support from Solo Cup's employees. In distinguishing these circumstances from those in *Logan Valley Plaza, supra,* the court said:

> While there were no fences surrounding the area and no guards were posted at the entrance to the [Industrial] District, the District was still private property and not open to public use. . . . None of the companies located there held itself out as being open to the public, and the general public had not reason to enter the area. [422 F.2d at 1151]

The issue in *Logal Valley Plaza* arose in a First Amendment context. There, Weis Markets, Inc. occupied a supermarket building in a large, newly developed shopping center complex, known as the Logan Valley Mall. Weis opened for business, employing a wholly non-union staff of employees, and shortly thereafter the union commenced picketing in and around the parcel pick-up area which extended along the front of the supermarket. The union pickets carried signs indicating that Weis employed non-union labor and that Weis' employees were not receiving union wages or benefits. Weis and Logan Valley Plaza obtained an injunction against this picketing in the Pennsylvania state court. The state court enjoined the pickets from trespassing on the property adjacent to the supermarket, the parking lot of the shopping center, and the parking lot entrances and exits. The Pennsylvania Supreme Court affirmed the issuance of the injunction on the ground that the pickets had trespassed under state law. The United States Supreme Court reversed that judgment, holding that a state, by the use of its trespass law could not bar picketing in the shopping center area. The Court began with the premise that the First and Fourteenth Amendments forbid a state from prohibiting peaceful picketing in a place generally open to the public, absent special factors relating to the purpose or manner of the picketing. The Court likened the circumstances to that of

the company town in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), commenting:

> ". . . In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U.S., at 502-503. [391 U.S. at 317]

The Court held:

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the public in the area and those passing through," *Marsh* v. *Alabama*, 326 U.S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. [391 U.S. at 319-320]

We start from the premise that peaceful picketing carried on in a location generally open to the public is, absent special factors involving the purpose or manner of the picketing, protected by the First Amendment. We think it clear that union organizers in soliciting support through peaceful picketing exercise First Amendment rights. The essential distinction between *Babcock & Wilcox* and *Logan Valley Plaza* rests upon a determination as to the use of the properties in question.

In the instant case, the Board noted that the "enclaves in which respondent's stores are located also contain other business enterprises"; that no fences, gates, guards or signs bar anyone's use of the premises and that the premises in question are "accessible to the public without

limitation." This situation more nearly resembles the circumstances presented in *Logan Valley Plaza* than those presented in *Babcock & Wilcox*. The Board here found Central Hardware's parking lots to be generally open to the public, to have "a quasi-public status." The record, as a whole, furnishes adequate support for this finding which then binds us upon our review. 29 U.S.C. § 160(e). See *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404 (1962); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Under the mandate of *Logan Valley Plaza*, we hold the Company's non-employee no-solicitation rule to be overly broad as applied to its parking lots. Thus, we sustain the Board's determination that the Company's enforcement of this rule against the Union constituted an unfair labor practice in violation of § 8(a)(1) of the Act.

Other Alleged Unfair Labor Practices

The Board, contrary to the Trial Examiner, viewed Union representative Kapetanakis' arrest as an unfair labor practice. We think this finding lacks substantial support in the record. The Company had the right to bar Kapetanakis from the store; he was not a bona fide customer and his primary purpose in entering the store was to check employees, thus disrupting selling areas.

The Board also found the Company committed an unfair labor practice in a speech where vice president Reed told the employees they were receiving greater benefits than those paid to employees in comparable unionized stores and that if the employees were to select the Union as their collective-bargaining representative "all bets are off and we start from scratch." The Board views these statements as being made in the context of "other substantial unfair labor practices as constituting a promise that existing benefits would be continued and increased if the employees refrained from supporting the Union and also as a threat that they would be discontinued or minimized if the Union was supported."

The Board acknowledges that the employer is free to communicate its views respecting a union or union representation. If the employer's right of free speech is to be permitted and made meaningful, the employer as well as the union organizers should be allowed to communicate opinions and ideas on the relative merits of the collective bargaining process and the particular union in issue. This the employer may do as long as his statements do not contain "a threat of reprisal or promise of benefit." *NLRB* v. *Gissel Packing Company, Inc.*, 395 U.S. 575 (1969). There is no threat of retaliation and the words spoken do not appear to contain any promises or threats. The employer certainly is entitled to state that its employees are currently being better treated than comparable unionized employees and also to convey the legal facts of life that if a union is voted as the bargaining representative the employer must bargain with the union rather than offer increased benefits directly to the employees.

The real test here is whether the employees could reasonably conclude that they were being threatened with economic reprisal. *NLRB* v. *Louisiana Manufacturing Company*, 374 F.2d 696 (8th Cir. 1967). There is no evidence that any employees were so intimidated and the entire speech itself appears to be within the permissible limits of § 8(c) (29 U.S.C. § 158(c)). During the course of his speech, vice president Reed stated that the Company recognized the rights of the employees to determine for themselves if they would like to organize and, after presenting his arguments against the Union's efforts, concluded, "Let me say again that the decision to organize rests with each and everyone of you on an individual basis." Neither this speech nor the subsequent actions of the Company give rise to a valid conclusion that the Company was threating reprisal or promising benefits over and beyond the permitted general statements that the employees would be better off without selecting the Union as their bargaining agent, which in turn is merely a counter statement to the

Union's position that the employees' benefits and conditions of employment would be bettered by joining the Union. There was no specific promise of an immediate increase in benefits by not supporting the Union.

The Board also found supervisor Cavellier's question to employee Ragle as to whether she would "like to have the Union in here" constituted an unfair labor practice. The Trial Examiner did not think so and neither do we. The interrogation was certainly not coercive and merely constituted an isolated questioning of an employee. There was no systematic intimidation nor any coercive connotation to this isolated interrogation. *Beaver Canning Company* v. *NLRB*, 332 F.2d 429 (8th Cir. 1964).

In conclusion, we therefore hold that the Company committed an unfair labor practice in its overly broad no-solicitation rules and in the three-day suspension of employee Ragle, and the Board's order with respect to those items is ordered enforced. The balance of the Board's order lacks substantial support in the record and enforcement thereof is denied.

GIBSON, Circuit Judge (concurring in part and dissenting in part):

I concur with all of the per curiam except that portion of the opinion holding the Company's non-employee no-solicitation rule to be overly broad as applied to its parking lots.

The majority views *Logan Valley* as modifying *Babcock*, thus giving union organizers free access to any company premises that are quasi-public in character. They apparently equate solicitation by the union organizers to picketing—an equation which I cannot make—for the record does not disclose picketing activity by the union organizers. This is a critical distinction which the majority fails to discuss. The *Logan Valley* decision approved peaceful

picketing as a protected First Amendment right on property maintained as a shopping plaza for the benefit of a number of different retail outlets and the public, noting that where an owner places his property in public use, the owner's rights are circumscribed both by statutory and constitutional rights of those who use the property. In my view, the union picketing in *Logan Valley* is a distinctly different type of communicative activity from the union solicitation activity in the instant case. The First Amendment interest in protecting peaceful picketing is obvious since picketing has as its objective the conveyance of a message to the public, but is considerably less clear here where the union's solicitation message is directed solely to the company employees and is imposed by confrontation and argument (to which some employees objected). Consequently, I view this question as limited to the statutory rights of union organizers to communicate with employees and conclude that the standards articulated in *Babcock*, rather than *Logan Valley*, are controlling.

Furthermore, I do not think *Logan Valley* is applicable because the parking lots in the instant case were not of such a public character that the owner lost or waived almost all rights of control over their use. The Trial Examiner's and the Board's characterization of the parking lots as equivalent to shopping centers is not warranted by the evidence. These parking lots were solely for the benefit of the employer's customers and employees. They were not set up for the purpose of allowing "one-stop shopping." They were not public squares or the equivalent and they did not create a *"cordon sanitaire."* These parking lots were set up and maintained for the sole purpose of supporting the employer's business and none other. The fact that a few small stores were adjacent to the lots would not alter their character into that of a shopping center operation. In no sense of the word are these private parking lots (maintained for employees and potential customers) public streets, public squares, public parks or their equivalents.

In *Babcock* the Supreme Court held that a company can lawfully post its property against non-employee solicitation (1) "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" and (2) "if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. Utilizing this standard, I must conclude that the Company's non-employee no-solicitation rule is lawful.

With respect to the first aspect of the *Babcock* test, there is no substantial evidence in the record showing that the employees were inaccessible or that reasonable attempts to communicate with them were ineffective. The Union had a list of employees 80 per cent complete and had for a period of time an inside organizer; and it otherwise had unrestricted access to contact the employees at their residences. The Union could invite the employees to any union or organizational meeting and had open many of the conventional means of communication, mail, telephone, personal contacts, etc. The burden was not on the Company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel. This is not a case of the company town controlling all avenues of access and meeting place, *cf. NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949); or a resort hotel where the employees live on company premises, *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967); or a lumber camp where employees live on the company's premises, *NLRB* v. *Lake Superior Lumber Company*, 167 F.2d 147 (6th Cir. 1948). The mere fact that it would be much more convenient for the Union organizers to meet with employees and accost employees on the Company's parking lot is insufficient to invalidate the non-employee no-solicitation rule under the rule enunciated in *Babcock*.

Applying the second part of the *Babcock* test to the instant case, I find that while the Board found that both

the employee and non-employee no-solicitation rules were discriminatorily applied, the record does not contain substantial evidence that the non-employee no-solicitation rule was discriminatorily applied. There is no evidence of any non-employee solicitation being permitted or sanctioned by the Company. This finding is drawn from thin air, completely devoid of factual substantiation.

The majority opinion, which in effect appropriates and directs the use of the Company's parking lots for union organizational purposes, goes far beyond *Logan Valley;* it sanctions trespass and impairs personal and property rights on the altar of collectivism. The result reached by the majority is an improper balancing of the rights of management to reasonably control its private property and the rights of employees to organize: it is neither warranted by law nor supported by substantial evidence in the record. I would not order enforcement of this segment of the Board's order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1469

HOMART DEVELOPMENT CO., *Petitioner,*

v.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., and WILLIAM DUXLER, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Affidavit of R. M. Brough

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I, R. M. BROUGH, being first duly sworn upon oath, state as follows:

I am employed by Sears, Roebuck and Co., and serve as Manager for its Inglewood, California retail store located at 500 East Manchester Boulevard, Inglewood, California. My telephone number is (213) 678-2521.

On Saturday, March 20, 1971, I arrived at the Ingleword retail store location shortly after 11:00 o'clock A. M. As I approached the south entrance to the store I observed a young man attending some card tables which had been set up adjacent to the entry way. Placed on these tables were a number of documents as well as a can labelled "25¢ Donation" or words to that effect. I asked this person whether he had permission to be there and he responded that his companion had gone upstairs to see the store manager. I then walked to my office which is located on the second floor of the store.

Shortly after I reached my office a young lady approached me and inquired whether I was the manager. After identifying myself, she requested permission to use our property to solicit signatures on a petition. I cannot recall precisely the subject matter of this petition. I informed the lady that our policy was not to allow activities of this nature to be conducted on the premises.

Having expressed a refusal to her request, the lady's tone of voice became more aggressive. She handed me a copy of the January 1971 issue of "Agenda '71". This is a newspaper published by the People's Lobby. I was also told that the Supreme Court of California had recently issued a ruling authorizing the public to solicit signatures for petitions on private as well as public property.

After reading a few articles appearing on the first page of the newspaper I had been handed, my impression was that the California decision applied only to "shopping centers". I related this observation to the girl. (The Inglewood store is a free-standing structure bordered by public streets on two sides and privately owned parking facilities on the remaining two.) The lady informed me the California Supreme Court decision applied to any shopping area. I strongly doubted the accuracy of this statement. However, since legal advice was not immediately available, I decided it would be wisest to let these people use our property. They were allowed to obtain signatures and collect contributions outside the south entry to the building.

The following week I communicated with our legal department to receive guidance on how future requests to use company property should be handled. Joseph L. Davis, Attorney, discussed with me in some detail the *Diamond* v. *Bland* decision. Mr. Davis agreed with my opinion that this case was restricted to "shopping centers." However, he said we were provided no guidance as to what that might include. We discussed the equities of the *Bland*

decision in some detail. I explained that our customers come to the Inglewood store to shop. They are entitled to expect freedom from solicitors and other forms of imposition. From a personal standpoint, the responsibility of overseeing the business operations is a full time and demanding job. It seems quite unreasonable to expect a person in my position to also supervise activities conducted by non-employees on the premises.

I asked Mr. Davis whether the California decision meant that labor organizations now had the right to solicit membership on our property outside the building. His response was that it would be difficult to predict just how far reaching the *Diamond* v. *Bland* ruling might be if it were allowed to stand. I recently have been informed that the parties agreed to a stay of judgment until the United States Supreme Court makes a review of this case.

I have read the above statement consisting of 3 pages and affirm the contents to be true and correct to the best of my knowledge and recollection.

Subscribed to and sworn before me this 30 of April 1971.

R. M. BROUGH
R. M. Brough

CHARLES E. O'BRIEN
Notary Public

(SEAL)

My Commission Expires Apr. 21, 1974